88-1077 (1)

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,

and

MANUEL DIAZ,
Petitioners,

vs.

LERCY D. BENITEZ-ALLENDE, *et al.*,
CARMEN CRUZ DIAZ, *et al.*,
RAMONITA GARCIA ANDINO, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeal for the First Circuit

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I.

QUESTIONS PRESENTED

I.

DID THE FIRST CIRCUIT ERR IN NOT GRANTING SUMMARY JUDGMENT AT THE CLOSE OF DISCOVERY WHERE THE PLAINTIFF FAILED TO DEMONSTRATE ANY EVIDENCE WHICH WOULD ESTABLISH TWO ESSENTIAL ELEMENTS OF ITS CASE, TO WIT: THE EXISTENCE OF A DEFECT AND ITS CAUSAL CONNECTION WITH THE ALLEGED INJURIES?

II.

DID THE FIRST CIRCUIT ERR IN DEPRIVING THE PETITIONER OF ITS RIGHT TO SUMMARY JUDGMENT BECAUSE IT INSISTED ON ITS RIGHTS TO A HEARING AND DETERMINATION OF THE DISCOVERABILITY OF EXPERT ASSISTANCE ACQUIRED EXCLUSIVELY TO ASSIST COUNSEL IN THE PREPARATION OF LITIGATION?

III.

DID THE FIRST CIRCUIT ERR IN HOLDING THAT THE PROPER REMEDY FOR THE FAILURE TO DISCLOSE AN EXPERT OPINION IN DISCOVERY WAS NOT TO PROHIBIT ITS ADMISSION AT TRIAL BUT RATHER TO PERMIT OPPOSING COUNSEL "WIDE DISCRETION" IN ASKING THE EXPERT DURING CROSS-EXAMINATION WHY HE HAD NO OPINION AT HIS DEPOSITION?

IV.

DID THE FIRST CIRCUIT ERR IN HOLDING THAT *IN PERSONAM* JURISDICTION WAS EXERCISED IN ACCORDANCE WITH THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION ON A FOREIGN NATIONAL WHO

II.

HAD NO PRESENCE IN THE UNITED STATES AND WHOSE PRODUCT WAS BROUGHT INTO THE UNITED STATES BY A WHOLLY INDEPENDENT THIRD PARTY?

V.

DID THE FIRST CIRCUIT ERR IN HOLDING THAT THE FOREIGN COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION ONLY APPLIES ONLY TO PROPERTY TAXES AND DOES NOT RESTRAIN STATES FROM THE IMPOSITION OF PRODUCT LIABILITY REGULATION ON ACTIVITIES CLEARLY CONDUCTED IN FOREIGN COMMERCE?

VI.

DID THE FIRST CIRCUIT ERR IN AFFIRMING A JURY VERDICT BASED ON AN INTERPRETATION OF A JURY INSTRUCTION THAT IS CONTRARY TO ITS COMMON SENSE MEANING, CONTRARY TO THE UNDISPUTED EVIDENCE AND THUS CONSTITUTED A DENIAL OF PETITIONER DIAZ'S RIGHT TO PROCEDURAL DUE PROCESS?

VII.

DID THE FIRST CIRCUIT ERR IN AFFIRMING A JURY VERDICT THAT WAS LOGICALLY INCONSISTENT, BASED ON SPECULATION, AND DID SUCH ERROR CONSTITUTE A DENIAL OF PETITIONERS' RIGHTS TO PROCEDURAL DUE PROCESS?

III.

LIST OF PARTIES

PETITIONERS:

ALCAN ALUMINIO DO BASIL, S.A. MANUEL DIAZ

RESPONDENTS:

LERCY D. BENITEZ-ALLENDE and NESTOR JAVIER MATTA, both personally and representing the conjugal partnership by both composed, and RAFAELA ALLENDE,

CARMEN CRUZ DIAZ, on her own behalf and on behalf of the Conjugal Community had with ELPIDIO RIVERA MARTINEZ and/or ELPIDIO RIVERA MARTINEZ on his behalf,

and

RAMONITA GARCIA ANDINO, RAMONITA ANDINO ROSA

IV.

RULE 28.1 STATEMENT

Petitioner Alcan Aluminio do Brasil, S.A. ("Alcan") is a Brazilian corporation and has no United States subsidiaries. However, Petitioner does participate in the ownership of two foreign corporations which are the following:

Mineracao Rio do Norte, S.A.,
Rio de Janeiro, R.J., Brasil

Petrocoque S.A.-Industria e Comercio,
Cubatao, S.P. Brasil

Petitioner Alcan is a wholly owned subsidiary of Alcan Aluminium Limited, a Canadian corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED I

LIST OF PARTIES III

RULE 28.1 STATEMENT IV

TABLE OF AUTHORITIES VIII

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED .. 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. This Court Should Review These Cases Because The Ruling Of The First Circuit With Respect To The Proper Application Of Rules 26, 37 And 56, Federal Rules Of Civil Procedure: (1) Disregards This Court's Explicit Holding in *Celotex Corp. v. Catnett*, 106 S. Ct. 2542 (1986); (2) Conditions The Right To Summary Judgment On A Waiver Of The Attorney Client Privilege; And (3) Effectively Eliminates The Right To Expert Discovery 5

A. The First Circuit's Opinion Effectively Rejects This Court's Holding In *Celotex Corp. v. Catnett*, 106 S. Ct. 2549 (1986) ... 8

B. This Court Should Review The First Circuit's Decision Because It Conditions The Right To Summary Judgment On A Waiver Of The Right To Object To The Production Of Documents As Seconded By The Federal Rules Of Civil Procedure .. 10

C. This Court Should Review This Decision Because The Holding Of The First Circuit Is Directly Contrary To The Accepted Role Of Discovery Under The Federal Rules.... 13

II. This Court Should Review This Case Because It Presents An Important Issue As To Whether The United States Courts, Consistent With The Due Process Clause Of The United States Constitution, Can Exercise In Personam Jurisdiction Over A Foreign Corporation That Designs, Manufactures, Sells And Delivers A Product In Its Own Country 16

III. This Court Should Review This Case Because It Presents An Important Issue Of First Impression And It is Inextricably Intertwined With The Legal Principles This Court Will Undoubtedly Review Concerning The Appropriateness Of Unitary Taxation As Applied To Foreign Parent Combinations..... 20

IV. This Court Should Review This Case Because It Involves Serious Deprivations Of Procedural Due Process 22

A. Petitioner Manuel Diaz Was Denied Procedural Due Process In That Liability Was Not Predicated On A Clear Instruction To The Jury 23

B. Petitioners' Rights To Procedural Due Process Were Denied Because The Jury Verdict Was Based On Speculation..... 26

CONCLUSION..... 29

APPENDIX:

Opinion of the Court of Appeals for the First Circuit (September 20, 1988) A1

Judgment Entry of the District Court (October 30, 1987) A23

Decision of the Court of Appeals for the Seventh Circuit in *Alcan Aluminum Limited v. Franchise Tax Board of the State of California, et al.* A25

Judgment Entry of the Court of Appeals for the First Circuit (September 20, 1988) A49

Order of the Court of Appeals for the First Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc (October 24, 1988) A51

Order of the Court of Appeals for the First Circuit re Mandate (November 1, 1988) A53

Order of the United States Court of Appeals for the First Circuit (November 23, 1988) A54

Notice of the United States Supreme Court Denying Stay Pending Disposition of Petition for Writ of Certiorari A55

Petition for Rehearing En Banc Filed in the Court of Appeals for the First Circuit A57

Letter to Larry Salibra from Arthur D. Little, Inc. A77

TABLE OF AUTHORITIES

Case Laws:

Alcan Aluminio Do Brasil, S.A. v. Hernandez, Case No. 85-0728 (D. Fla. filed July 15, 1985)..... 11

Alcan Aluminium Limited v. Franchise Tax Board of the State of California, No. 87-2239, 1988 U.S. App. Lexis 147-43 (7th Cir. Oct. 19, 1988) 20,21

Asahi Metal Industry, Ltd. v. Superior Court of California, County of Solano, 107 S. Ct. 1026 (1987) 16,17,18,21

Celotex Corp. v. Catnett, 106 S. Ct. 2542 (1986) 5,8

Container Corporation of America v. Franchise Tax Board, 463 U.S. 159 (1983)..... 20

Erskine v. Consolidated Rail Corporation, 814 F.2d 266 (6th Cir. 1987)..... 13

Humble v. Toyota Motor Company, Ltd., 727 F.2d 709 (8th Cir. 1984)..... 18

Johnson v. H.K. Webster, Inc., 775 F.2d 1 (1st Cir. 1985) 13

Laaperi v. Sears Roebuck & Co., 787 F.2d 726 (1st Cir. 1986)..... 13

Room v. Caribe Hilton Hotel, 695 F.2d 5 (1st Cir. 1981)..... 26

Vencedor Manufacturing Co., Inc. v. Gougler Industries, Inc., 557 F.2d 886 (1st Cir. 1977)..... 19

Constitutional:

U.S. Const., Art. I, §8, cl. 3 1

U.S. Const., Amend. V 1

Congressional Material:

Fed. R. Civ. P. 26 5

Fed. R. Civ. P. 26(b)(4) 11

Fed. R. Civ. P. 37 3,5,7

Fed. R. Civ. P. 56 2,13

Texts:

63 Am. Jur. 2d, Product Liability, 0548 14

Annot., 13 A.L.R.3d 1057 (1987) 14

Guidelines for Practice Under the Federal Rules, (1985), Guideline 5, American Corporate Counsel Association 9

J. Moore, Moore's Federal Practice, *Federal Civil Rules,* 26.66 (1988) 15

Resnik, *Failing Faith: Adjudicatory Procedure in Decline,* 53 U. Chi. L. Rev. 494 (1988) 16,22

Restatement of Torts (Second) §402 14

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

OPINIONS BELOW

Verdicts were returned in these consolidated cases on October 29, 1987 and judgment entered against petitioners on October 30, 1987 by the United States District Court of Puerto Rico (Appendix A23). The First Circuit issued its Slip Opinion affirming the judgments against petitioners and vacating and remanding the judgments disallowing the claims of Cruz Diaz and Benitez-Allende as to Petitioner Diaz on September 20, 1988 (Appendix A1). Petitioner's Petition for Rehearing En Banc was denied on October 24, 1988 (Appendix A57).

JURISDICTION

The order of the First Circuit Court of Appeals denying our Petition for Rehearing was entered on October 24, 1988. This Court's jurisdiction is invoked under 28 USC Sec. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Article I, Section 8; clause 3:

"The Congress shall have the power . . . [t]o regulate commerce with foreign nations. . . ."

U.S. Constitution, Amendment V

"No person shall be . . . deprived of life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

This case arises out of claims by the Respondent-Plaintiffs that they suffered injuries as a result of defects in Rochedo pressure cookers manufactured by Alcan Aluminio do Brasil, S.A. ("Alcan"), a Brazilian company who designs, manufactures, sells and delivers its cookers in Brazil, to both local and foreign customers.

A small portion of the total production of the Rochedo cookers were purchased by U.S. wholesalers who purchased the cookers in Brazil and arranged for the importation of the cookers into the United States. It was apparently three of these cookers which are the object of this litigation.

Appellant Alcan challenged the jurisdiction of the Federal District Court over its person in that it had no presence in the United States and that all transactions that allegedly gave rise to the claims in this lawsuit took place in Brazil. Its motion to dismiss was denied by the District Court and that holding was affirmed by the First Circuit (Appendix A1).

In addition, Alcan argued that even if jurisdiction was proper, it was improper to adjudicate Alcan's responsibility under Puerto Rican Law since that would constitute the regulation of activities exclusively in foreign commerce, clearly prohibited by the Foreign Commerce Clause of the United States Constitution. The trial court denied this motion. The First Circuit affirmed (Appendix A2).

Prior to trial, Petitioners filed a motion for summary judgment pursuant to FRCP 56. The motion was based on the fact that the plaintiff's expert, Dr. Kenneth Soderstrom, testified at the close of discovery that he had no opinion, nor could he have an opinion because he had not examined the cookers and did not know how the accidents occurred. Dr. Soderstrom was the only person

who was designated as providing evidence on the alleged defect of the cookers and the causal connection between that defect and the injury. The motion was also based on answers to hypothetical questions posed to Dr. Soderstrom at his deposition. In those hypotheticals, Dr. Soderstrom was presented with the circumstances related by his clients surrounding the alleged incidents. In each case, Dr. Soderstrom testified that he was unable to render an opinion that confirmed his clients' testimony, and in two of the cases he specifically testified that the accidents simply could not have occurred as his clients had stated. The trial court denied the motion.

Subsequently, Alcan filed two motions *in limine*. The first motion requested pursuant to Rule 37 that the Court preclude all testimony of Dr. Soderstrom that exceeded his testimony in discovery. The second motion asked that, in the event that the court denied our first motion, discovery be reopened so Petitioners could ascertain if Dr. Soderstrom had formulated an opinion. Both motions were denied by the court on the day of trial. The trial court held that the proper remedy for no opinion was to give Petitioners wide discretion in asking the witness why he had no opinion. The First Circuit affirmed the denial of all three motions.

In submitting proposed jury instructions, the plaintiffs requested that the jury be instructed with respect to Petitioner Diaz that he should be liable as a seller. The court refused to give that instruction. Diaz was found liable under the given instruction and the instruction and evidence do not support the verdict. The First Circuit, none-the-less, affirmed the verdict.

In addition, the Petitioners argued at the First Circuit that the jury verdict was based on speculation and that portions of the verdict were logically contradictory. The First Circuit affirmed,

notwithstanding the fact that its own attempt to consistently explain the verdict was itself logically inconsistent.

Petitioners filed a petition for rehearing (Appendix A57). That petition was denied (Appendix A51). Petitioners filed a motion to stay the issuance of the mandate for thirty days to permit appeal to this court and that motion was denied (Appendix A54).

Petitioners sought a stay from this court, which was denied December 4, 1986 (Appendix A55) and this appeal followed.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THESE CASES BECAUSE THE RULING OF THE FIRST CIRCUIT WITH RESPECT TO THE PROPER APPLICATION OF RULES 26, 37 AND 56, FEDERAL RULES OF CIVIL PROCEDURE: (1) DISREGARDS THIS COURT'S EXPLICIT HOLDING IN *CELOTEX CORP. V. CATNETT,* 106 S. Ct. 2542 (1986); (2) CONDITIONS THE RIGHT TO SUMMARY JUDGMENT ON A WAIVER OF THE ATTORNEY CLIENT PRIVILEGE; AND (3) EFFECTIVELY ELIMINATES THE RIGHT TO EXPERT DISCOVERY.

These cases involve a claim that a defect in the design or manufacture of Rochedo pressure cookers resulted in injuries to the plaintiffs. Specifically, plaintiffs alleged said defect allowed the cooker to be opened while it contained a minimal amount of pressure. Critical elements to the cases are a showing that a design or manufacturing defect existed and that it caused the plaintiffs' injuries. Dr. Kenneth Soderstrom, an expert witness identified by the Plaintiffs, was to provide evidence as to those points.

Dr. Soderstrom was not engaged by the plaintiffs until May of 1987, just a few weeks before the first scheduled trial date and nearly four years after the first of these later consolidated cases was filed. His deposition was initially scheduled mere weeks before trial and just prior to the first discovery cut-off date. Discovery had to be reopened and, when Dr. Soderstrom was finally deposed, he was unable to render any opinion as to a design or manufacturing defect of Alcan's product and its causal connection with the alleged injuries. In addition, he gave two reasons why he was unable to render such an opinion. First, he said that he had not examined the cookers:

> "... I had them in my possession and I was doing some other things. I wasn't examining the pots, and I am not saying I didn't have the time. If I had been told you have from now until Thursday to do this, fine, but I thought I had from then until now to do it."

(TR 11.)[1] Plaintiffs' counsel, who had already failed to produce Dr. Soderstrom before discovery closed the first time, simply neglected to tell him that he was to be prepared to render an opinion at his deposition.

In addition to not being told to be able to render an opinion, Dr. Soderstrom was never given the necessary prerequisite information that would enable him to render an opinion as to causation since he was not acquainted with the circumstances of the injuries. In fact, when specifically asked whether or not he could render an opinion as to the causal connection between any alleged injury and any defect, Dr. Soderstrom specifically stated that he could not because he had not been told how the injuries occurred:

> Q. Have you had an opportunity to reach a professional judgment as to how these particular pot[s] related to the alleged injuries?
>
> A. I have not been able to make a complete judgment on that. Primarily because I have not seen yet the full depositions of the people that were involved in those accidents, so therefore—I mean, I have not made—if I had those depositions I would be in a better position to try to make that judgment. I cannot—I can make speculations but I cannot make full fact judgments here. ...

(TR 11-12.)

At the deposition, Dr. Soderstrom was given hypothetical situations involving the alleged "explosions" and asked whether the explosions could

[1] References to the trial transcript will be designated by the prefix "TR".

have occurred under those circumstances. The hypothetical situations presented to him specifically reflected the testimony of his own clients as to how the alleged explosions occurred. In two of the three cases, Dr. Soderstrom testified that the explosions could not have occurred. In the third situation, Dr. Soderstrom was unable to reach a conclusion given the facts available.

This was the state of the facts at the close of discovery, just two days after the Soderstrom deposition. Alcan promptly moved for Summary Judgment. That motion was denied. Petitioners then filed a *Motion In Limine* pursuant to Rule 37 to exclude any opinion of Dr. Soderstrom which he formulated after his deposition. In the alternative. Petitioners moved to reopen discovery. The trial court denied all of Petitioners' motions on the day trial commenced. Although it conceded that Dr. Soderstrom did not have an opinion at the close of discovery, it concluded that the defect could be cured by allowing "plenty of leeway" in cross examination as to why he had no opinion:

> The Court: We will—this is what we are going to do with Mr. Soderstrom. He is going to testify because he was announced. And of course, I will give you plenty of leeway to deal with him and ask him why is it when you deposed him he had no opinion . . .

(TR 47.)

Upon review, the First Circuit sustained the actions of the trial court on three grounds. First, it concluded, contrary to the District Court, that Dr. Soderstrom did have an opinion which it characterized as "somewhat vague and conclusory." (Appendix A11). Second, the Circuit Court concluded that problems of vagueness could be cured by forcing the parties to trial (Appendix A11). Finally, the First Circuit concluded that Petitioners were in part responsible for the plaintiffs'

expert not having an opinion because we failed to disclose a report of Arthur D. Little Laboratories on cookers which did not involve those of the plaintiffs, and which the Petitioners' claimed was privileged, until the District Court had resolved a fully briefed motion to compel (Appendix A12).

A. The First Circuit's Opinion Effectively Rejects This Court's Holding in *Celotex Corp. v. Catnett*, 106 S. Ct. 2549.

In *Celotex*, this Court held:

> In our view, the plain language of Rule 56(c) *mandates the entry of summary judgment*, after adequate time for discovery upon any motion, *against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case*, and on which that party will bear the burden of proof of trial. In such a situation, there can be "no genuine issue as to any material fact," since *a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.*

Id. at 2552, 2553. (Emphasis supplied.)

The facts of this case were even more compelling for summary judgment than those in *Celotex*. Unlike *Celotex*, where the motion was made within a year of the date on which the suit was initiated and before the close of discovery, this motion was made almost (4) years after the first case was initiated and *after the close of discovery*. Moreover, in this case, Alcan's motion was based not on the absence of evidence, but rather, on the explicit testimony of the Plaintiff's expert that *he had no opinion*. Even the District Court recognized "he had no opinion." (TR 47).

The holding of the First Circuit that Dr. Soderstrom had a "somewhat vague and conclusory" opinion is a transparent effort to avoid the clear

mandate of this Court. If this Court allows that decision to stand, it will tacitly overrule itself. In addition, it will stifle the emerging trend to permit the courts to dispose of cases that are not adequately supported by the evidence and increase the probability of jury speculation when cases are presented to it that do not meet the basic tests of justiciability.

Finally, failure to review the decision of the First Circuit will undercut efforts to expedite and reduce litigation costs. For example, Guideline #5 of *Guidelines For Practice Under the Federal Rules* (1985), prepared by the American Corporate Counsel Association in response to the policy underlying the 1983 amendments to the Federal Rules states:

> In initially evaluating a pleading from the perspective of plaintiff or defendant, primary focus shall be given to resolving all or as many issues in dispute as possible by means of a Rule 56 motion for summary judgment.

Id. at p. 4-F.

The comment to the Guideline states:

> In the past, courts have been reluctant to grant motions for summary judgment and consequently they have not been used as often as they might. The fact remains that the use of Rule 56 motions can greatly reduce litigation costs and speed up the trial. While it is our practice to file motions on the basis of cost/benefit trade-offs, attorneys representing the Company shall not decide against filing a motion merely on the basis of the perceived judicial reluctance to grant such motions ... Similarly, Rule 56 motions shall be given priority consideration throughout the proceedings as papers are filed or produced by the adversary. . . .

Id. at 4-F.

The decision of the First Circuit in this case will discourage the positive efforts to strive for the cost-effective management of litigation, decrease the

predicability of the justice system, and strongly suggest that judicial whim, rather than the equal application of the rules, is the hallmark of the judicial decision-making process.

B. This Court Should Review The First Circuit's Decision Because It Conditions The Right To Summary Judgment On A Waiver Of The Right To Object To The Production of Documents As Seconded By The Federal Rules of Civil Procedure.

The second rationale for the First Circuit's affirmance was predicated on the proposition that Petitioners were, in part, responsible for the Respondents' expert not having an opinion. This is rather remarkable since the First Circuit first basis for sustaining the District Court was that Dr. Soderstrom did have an opinion. The First Circuit states in relevant part:

> Further, Soderstrom's uncertainty did not reflect *only* Plaintiff's failure to comply with the court's discovery schedule. The Defendants too were somewhat dilatory. They did not supply Plaintiffs with the tests that Alcan/Brazil commissioned from an independent laboratory—tests about the cookers' tendency to explode—until Plaintiffs obtained a specific court order, two months after Soderstrom's deposition and the previously designated close of discovery, and just one month before trial.

(Appendix A12).

Once again, the First Circuit simply mischaracterizes the facts to reach a predetermined result. Actually, the Respondents made enormous discovery demands on the Petitioners. Volumes of documents were produced and interrogatories answered. The Respondents conducted separate discovery for each Respondent although the cases were consolidated. This contrasts markedly with the meager discovery conducted by the Petitioners which was limited to the depositions of five of the seven named

Respondents and only two of the Respondents' experts, Dr. Soderstrom and Dr. Pando, a clinical psychologist who testified as to the mental depression of Ms. Andino. Thus, to suggest that Dr. Soderstrom was unable to testify as to causation because a study was not supplied is incredible. Even if he had the study, he still did not know how the accidents occurred, and the study did not address itself to the cookers of these Respondents, who had refused to have their cookers examined by the Arthur D. Little Laboratory ("Little"), the authors of the study.

Of greater concern than the problem that the holding of the First Circuit is not an accurate characterization of the facts, the decision effectively penalizes the defendants for insisting on their rights under the Federal Rules. A review of the facts illustrates this point. Little was engaged exclusively for the purpose of assisting counsel in the preparation for litigation (see Appendix A11). Little was not being called to testify nor, as stated, did it examine the Respondents' cookers.

There were three simple reasons Respondents did not get the study as soon as the First Circuit concludes it was necessary for Dr. Soderstrom to form an opinion. First, the Respondents did not request the study until March 25, 1987, just a few months before trial and almost four years after the lawsuits were commenced. (In point of fact, it would have done them little good to have obtained it earlier, since they did not engage their expert until mid-May of 1987, about six weeks before the first scheduled trial date!) Petitioner objected to the production of the Little documents on the ground it was attorney work product and, thus, was not subject to discovery pursuant to FRCP 26(b)(4). Petitioner had prevailed on essentially the same issue in another pressure cooker case *Hernandez, (Alcan Aluminio do Brasil, S.A.*, Case No. 85-07280 (U.S.D.C., Fla. filed July 15, 1985)), in the Federal District Court of the Southern District of Florida.

The second reason Respondents received the study when they did is because they allowed their Motion to Compel to languish another month before filing it—almost in the middle of June, a few weeks before the scheduled trial date. That is hardly the conduct of attorneys seeking a document critical to their case.

The third reason Respondents did not receive the document until September is that the District Court took the rest of June, all of July and August, and almost all of September to rule on the motion. When it finally ordered it produced, Petitioner promptly provided the document.

Given these facts, one is hard pressed to believe that this document was the reason Dr. Soderstrom did not formulate an opinion. Moreover, given Dr. Soderstrom's testimony that he had no idea as to how the accidents occurred, one has to wonder how the First Circuit could have concluded that if Soderstrom had the Little study, he could have testified as to a causal connection between any defect evidenced by the Little study and the Respondents' injuries. What really throws serious doubt on both the correctness and spirit of the First Circuit's conclusion is the fact that the District Court, who reviewed the document, concluded that once the reference to the unrelated claims were deleted, the technical date was more beneficial to Alcan than the plaintiffs:

> The Court: ... If we eliminate the summary of claims, the rest is technical data, which, as I have seen here, is perfectly clean of any prejudice. And I just don't see why it should not be admitted. *As a matter of fact, if I thought it may help on some aspects of Alcan because it rules out the possibility of the lid rotating and opening on its own. So, therefore, the ruling of the Court is that if you insist Mr. Lora, of having this in evidence I will admit identification 26 as is.*

Tr 28. (Emphasis added.)

However, the more compelling reason why this Court should hear this case is not because the First Circuit mischaracterized the facts alone, but because of that court's clear holding that if one insists on procedural due process rights under the Federal Rules, the lower Court will hold that against one in resolving a subsequent Rule 56 motion for summary judgment. The idea that insisting on a Court ruling on the appropriateness of discovery will result in losing a Rule 56 motion is repugnant to our system of justice and should be reviewed by this Court.

C. This Court Should Review This Decision Because The Holding Of The First Circuit Is Directly Contrary To The Accepted Role Of Discovery Under The Federal Rules.

Until this case, it had been well-established that the role of discovery was to prevent trial by ambush. In *Erskine v. Consolidated Rail Corporation*, 814 F.2d 266 (6th Cir. 1987), the Sixth Circuit stated: "One of the primary objectives of the discovery provisions embodied by the Federal Rules of Civil Procedure is elimination of surprise in civil trial (cites omitted). Trial by ambush is not contemplated by the Federal Rules of Civil Procedure. *Id.* at 272, citing *Woods v. International Harvester Co.*, 697 F.2d 635, 639 (5th Cir. 1983)."

Prior to this case, the same principles were applied by the First Circuit in *Johnson v. H.K. Webster, Inc.*, 775 F.2d 1 (1st Cir. 1985) and *Laaperi v. Sears Roebuck & Co.*, 787 F.2d 726, 733-734 (1st Cir. 1986).

Admittedly, discovery can and often is abused. Much discovery is conducted to harass the other party rather than to gain relevant information that is useful to the case. Petitioner submits, however, that under any standard a mere seven depositions which constituted Petitioners' total discovery in three consolidated multimillion dollar cases is hardly excessive.

Petitioners' discovery was designed to establish how the injuries occurred. Thus, the depositions of each of the physically injured Respondents was taken. In addition, two additional depositions were taken of people who were in the immediate vicinity of the alleged accidents. Dr. Soderstrom's deposition was taken to establish what defect, if any, existed in Petitioner's product, and the causal relationship between the defect and the injury.

It is this basic information that is minimally necessary to try this case without surprise, a principle abandoned by the First Circuit. Its reasoning is two-fold. First, it argues that Dr. Soderstrom gave the essence of his opinion that the cookers should have had a safety interlock that prevented the users from opening the cookers while they were pressurized, *and that was all Petitioner needed to know.* What the First Circuit ignores is the issue of causation. It is well-established that a defect alone does not establish liability; it must be shown to be the proximate cause of the injury. Annot., 13 A.L.R.3d 1057 (1987), Restatement of Torts (Second) §402 and 63 Am. Jur. 2d, *Product Liability,* 0548. The problem that was presented in this case is that two of the Plaintiffs testified that they were *not* trying to open the cookers (*as was alleged to be the defect*) when the cookers spontaneously exploded. Both Andino and Diaz stated that they were simply standing near the cooker, steam was escaping from the cooker valve as is normal in pressure cooker operation, when it suddenly exploded. One has difficulty finding any relationship between the absence of a device that is designed to prevent a user from accidentally opening a pressurized cooker and a spontaneous cooker explosion.

In fact, when Dr. Soderstrom was asked hypothetical questions reflecting his client's testimony as to how the cookers exploded, he concluded: (a) in the Andino case, that the explosion could not have occurred; (b) in the

Allende case, that there could not have been any pressure in the cooker when it was opened; (c) in the Diaz case, it did not appear that it exploded as Diaz claimed.

Dr. Soderstrom was unable to state how the injuries occurred and how the absence of an opening interlock related to the injuries. The suggestion of the First Circuit that this was adequate discovery to understand the nature of the claim and prepare a defense is simply incredible.

The second argument in permitting Dr. Soderstrom to testify notwithstanding the fact that he did not have a "complete, detailed account of his views at the deposition" is that the District Court could proceed to trial where the "parties could develop the case." Appendix A11. Such a proposition is not only unsupported by the cases Respondents cited (see Petition for Rehearing En Banc, Appendix A57), it is totally inconsistent with the objectives of discovery. Petitioner was simply unable to develop a rebuttal for a theory of liability it was not aware of until it was about to conduct cross-examination at trial. That is not, and has never been, the result contemplated by the Federal Rules of Civil Procedure:

> . . . [A] prohibition against discovery held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand.

J. Moore, Moore's Federal Practice, *Federal Civil Rules*, at 26.66 (1988).

A related argument of the First Circuit is that sanctions are discretionary with the District Court for failure to comply with the obligations of discovery.

Assuming that to be the case, the proposition that the District Court could deny the sanction of precluding the evidence and then deny our motion to reopen discovery in order to ascertain Dr. Soderstrom's opinion just does not make sense.

The First Circuit's rationale in this case has profound implications for our adversary system and for future application of the Federal Rules. If this decision is allowed to stand, it is difficult to envision the attorney who will not advise his expert not to have an opinion at the time of deposition, particularly if the opinion is judged to be one that would be easily challenged if one's opponent were given adequate time to respond.

Commentators have now begun to focus on the cost in terms of credibility we are being forced to suffer in the pursuit of resolution at all costs. See Resnik, *Failing Faith; Adjudicatory Procedure In Decline,* 53 U. Chi. L. Rev. 494 (1988). For this reason, this Court should review this decision.

II. THIS COURT SHOULD REVIEW THIS CASE BECAUSE IT PRESENTS AN IMPORTANT ISSUE AS TO WHETHER THE UNITED STATES COURTS, CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION, CAN EXERCISE IN PERSONAM JURISDICTION OVER A FOREIGN CORPORATION THAT DESIGNS, MANUFACTURES, SELLS AND DELIVERS A PRODUCT IN ITS OWN COUNTRY.

Interpretating *Asahi Metal Industry, Ltd. v. Superior Court of California, County of Solano,* 107 S. Ct. 1026 (1987), the First Circuit, in an exercise of vote counting, concludes that all nine justices of this Court would hold that jurisdiction has been properly exercised over Alcan once the Court learned that there were meetings between Alcan personnel and an independent

broker who encouraged American wholesalers to purchase Brazilian products in Brazil. The First Circuit states in relevant part:

> The opinion of the remaining four justices indicates that, once the factor of the meetings between Schmid and Diaz is taken into account, all nine justices would find the assertion of jurisdiction constitutional. These four justices state that:
>
> > The "substantial connection," ... between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*
> >
> > *Asahi,* 107 S. Ct. at 1033 (plurality opinion) (emphasis in original) (citations omitted).

Appendix A7.

We think that this type of vote counting is an improper way of analyzing the appropriateness of the assertion of jurisdiction in the international context. The *Asahi* opinion delineates a number of policy considerations necessary to evaluate the exercise of jurisdiction. In its brief before the First Circuit, Petitioner specifically analyzed those very principles. Petitioner demonstrated that Respondents had an adequate remedy without having to sue Petitioner. In fact, two of the three Respondents had initially sued both the retailer and the importer in State Court in Puerto Rico. Those cases were allowed to languish while the Respondents pursued the Petitioner in Federal Court. There is little doubt that the Respondents were motivated by the prospect of getting a far greater settlement sum from the Petitioner due to the difficulty of our having to litigate in a foreign country. Otherwise, Respondents could have simply pursued the local defendants who were directly responsible for importing the cookers, and those defendants could have sought their remedy under their contract with Petitioner.

Petitioner also spent considerable time demonstrating the similarity between its case and the mimimum contacts issue addressed in *Humble v. Toyota Motor Company, Ltd.*, 727 F.2d 709 (8th Cir. 1984), a case which this Court approved in *Asahi*, 107 S. Ct. 1026 at 1033. In *Humble*, an injured car passenger brought suit against Arahawa Auto Body Company, a Japanese corporation that manufactured car seats for the Toyota automobile involved in the case.

Petitioner is essentially on all four with Arahawa's position in *Humble*. The fact that Arahawa's seats were destined to the U.S. market in far greater volume than Petitioner's cookers is beyond doubt. The name of Toyota, the importer, is virtually a household word in the United States. Moreover, it is doubtful that evidence of Arahawa's officers' meetings with Toyota management in the United States to discuss seat design for the U.S.A. (an event that anyone familiar with business knows must have occurred) would have made any difference to this Court. Similarly, meetings between Petitioner's employees and independent brokers regarding purchases to be made in Brazil should not be treated differently. No doubt the location of the meeting was one of convenience. Would it make a difference if the meetings were in Brazil? Quite frankly, they could be held there if it is going to make a difference.

This Court is facing a new international marketplace. It is a marketplace of nations, not of states. Trade relationships must be governed by treaty, not judicial fiat. The reasoning of the First Circuit makes it clear that, notwithstanding *Asahi*, it finds itself unable to distinguish between states and nations:

> The fact that title to the cookers passed in Brazil is beside the point, for "[i]f *International Shoe* stands for anything, however, it is that a truly interstate business may not shield itself from suit by a careful but formalistic structuring of its business dealings."

Appendix A7, citing *Vencedor Manufacturing Co., Inc. v. Gougler Industries, Inc.*, 557 F.2d 886, 891 (1st Cir. 1977).

What the First Circuit misses is the obvious point that we are dealing here with nations, not states. Alcan's products are sold to purchasers worldwide. Only a very small portion of the cookers ultimately reach the United States. Under these circumstances, it is not unreasonable to assume that the importer, who would be familiar with the law of the country into which the product is being imported, will and should be responsible for insuring product compliance with local law and custom.

This is especially true where the law is the common law. Since the common law is much more like custom, and jury verdicts vary with cultural expectations, it makes good sense for many foreign manufacturers to rely on the expertise of the importer and his judgment as to what is appropriate for the nation into which he expects to import the products.

The First Circuit belittles the formalities, but formalities as between nations are important. Petitioner strictly adhered to formalities to make it clear that it was acting within the confines of Brazil. It expects and receives no benefits of U.S. law and the brand of cooker which is the subject of this lawsuit was held by a Brazilian Court not to be defective.

This Court should entertain this case because it reflects a characteristic insensitivity of our judicial system to the rights of foreign nationals acting wholly and legally within their nations. The matter of international trade, and the potential for extreme controversy, is well illustrated by the recent Canadian election debate over the Free Trade Agreement. It is illustrated by the controversy over unitary taxation. It is a matter properly settled by consent among nations through treaty, not the exportation of state law by the states or the Courts.

III. THIS COURT SHOULD REVIEW THIS CASE BECAUSE IT PRESENTS AN IMPORTANT ISSUE OF FIRST IMPRESSION AND IT IS INEXTRICABLY INTERTWINED WITH THE LEGAL PRINCIPLES THIS COURT WILL UNDOUBTEDLY REVIEW CONCERNING THE APPROPRIATENESS OF UNITARY TAXATION AS APPLIED TO FOREIGN PARENT COMBINATIONS.

In *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), this Court held that the imposition of state tax law on a worldwide combined group of companies with an American parent did not violate the Foreign Commerce Clause of the United States Constitution. In reaching that decision, the Court held that the case of the foreign parent corporation was not being encompassed by its ruling. Petitioner's parent corporation is now the chief architect of the foreign parent challenge in the federal courts, where the Seventh Circuit recently held that Alcan Aluminium Limited is directly burdened by the tax and, therefore, has standing. *Alcan Aluminium Limited v. Franchise Tax Board of the State of California*, No. 87-2239, 1988 U.S. App. Lexis 147-43 (7th Cir. Oct. 19, 1988) (Appendix A25).

In many respects, the foreign commerce principles in the tax area are inextricably intertwined with the foreign commerce principles involved in this case. In fact, the same principles and facts that give rise to constitutional challenge of unitary taxation are involved in this challenge, which asserts simply that even if jurisdiction is appropriate, the U.S. Courts may not subject a foreign national to liability under state law, for to do so would be to subject activities exclusively in foreign commerce to state regulation.

In the unitary tax context, one of the points of the constitutional challenge is that activities that take place wholly in foreign commerce are taxed again under the state unitary taxing scheme. Among the activities that

Alcan will point to as examples of the activities that are inappropriately subjected to state taxation are the design, manufacture, sale and delivery of cookers in Brazil. Why can't California tax these activities? Simply stated, they all take place in foreign commerce.

If the state of California cannot subject them to tax liability, how can they subject them to product liability under state law? Our answer is they cannot. The fact that the product is imported into the United States by a third party does nothing to change the analysis. Clearly, it would not change from the tax perspective; it also would not and should not change from the product liability perspective.

The fundamental principles that underlie Foreign Commerce Clause analysis for tax purposes are the same as those for product liability principles. The court in, *Alcan Aluminium Limited, supra,* stated in this respect.

> It is this possibility that implicates the concerns about foreign retaliation that have guided the court's interpretation of the foreign commerce clause. *See Japan Line,* 441 U.S. at 456; *see also Container Corp.,* 468 U.S. at 189 n.26, 195 n.32 (noting possibility that application of unitary tax to domestic subsidiaries of foreign companies may offend trading partners); *cf. Asahi Metal Indus. Co. v. Superior Court,* 107 S. Ct. 1027, 1034-35 (1987). Evaluation of the constitutional significance of this threat in the particular circumstances presented by California's unitary tax must await the district court's assessment of the merits of this appeal. We decide only that the potential for constitutionally significant offense is sufficient to create standing.

Slip Opinion, p. 18, Fn. 10. Appendix A43.

If you cannot tax a foreign national on activities conducted in his own country under state law, how can you subject the foreign national to product liability

under state law? The First Circuit's response is that the suggestion that you cannot is "farfetched" because tort law is a subject that "historically belongs to the states." (Appendix A9).

Foreign retaliation is clearly going to ensue if the view of the First Circuit gains any credibility. This Court should not await the brink of disaster before acting. It should not tolerate the type of conduct that would clearly annoy our foreign neighbors when the potential for retaliation is obvious.

IV. THIS COURT SHOULD REVIEW THIS CASE BECAUSE IT INVOLVES SERIOUS DEPRIVATIONS OF PROCEDURAL DUE PROCESS.

As was indicated earlier, there is growing commentary critical of the courts' practices of abandoning procedural protections that have been the hallmark of our system. See Resnik, *supra*, p. 16 at 498. Certain members of this Court have advocated expediency in the resolution of a dispute as a primary concern. However, our procedural protections were developed to do more than just to try to insure the right answer; they have been designed to instill a sense of credibility and legitimacy in the judicial system. Without the widespread perception of fairness in the system, reaching a result has little value. In reality, it does not resolve the dispute; it simply muffles it until sufficient dissatisfaction has accumulated among enough members of our society to publicize the problem. Insistence on procedural due process is a necessity.

Others have recognized serious problems. The Twentieth Century Fund has created a "Task Force on Judicial Responsibility" to review the conduct of the Federal Courts. Professor Baker's opening remark in the draft background paper for the Task Force is perhaps illustrative:

> In recent years, the role of the judiciary and the character and ability of those who preside over our federal courts have come under ever-increasing fire.

This case involves denials of procedural due process which are more than mistake. These denials verge on calculated conduct and for that reason this Court should review this case.

A. Petitioner Manuel Diaz Was Denied Procedural Due Process In That Liability Was Not Predicated On A Clear Instruction To The Jury.

It is undisputed that Manuel Diaz was not a manufacturer of the cookers. But, the charge to the jury was as follows:

> In addition to that classic negligence that I have discussed with you now, plaintiffs are relying on an alternate theory of recovery. The theory is known as that of products liability theory. It is also known as strict liability. The purpose of such theory of recovery is to make certain that the cost of damages, resulting from the use of a defective product, be paid by the manufacturer which placed such product in the market and not by third parties. In that sense, the liability is defined as strict liability and plaintiffs do not have to prove the negligence of the defendants in the classic fashion—in the classic manner which I described a minute ago. In other words, plaintiffs' burden is different, more easily established than in the traditional case of negligence.
>
> In order to recover under the strict liability or products liability principles, plaintiffs must establish three essential elements, which are the following: first, that the defendant, Alcan Aluminio do Brasil, S.A., manufactured the pressure cookers, which at the time that Alcan manufactured them, were in a defective condition; such that they failed to meet the average quality of similar products. Second, that the plaintiffs, in fact, suffered injuries as ultimate users of these pressure cookers. And third, that the defective condition of said pressure

> cookers proximately caused the injuries to the plaintiffs. If you find that plaintiffs have established each of these elements by a preponderance of the evidence, then you may find for the plaintiffs. Otherwise, if you are not satisfied that the above-mentioned elements were proved by a preponderance of the evidence, then you will find for the defendants.

(TR 503-504).

In charging the jury with respect to Diaz, the Court stated:

> In order to find Mr. Manuel Diaz liable under the theory of strict liability, which is the only theory that would apply to him, you must decide his case based on the same instruction that I gave you regarding the alternate theory of recovery of strict liability in relation to Alcan Aluminio do Brazil, S.A. Please remember that plaintiffs are not proceeding against Mr. Diaz, on the basis of the general theory of negligence.

(TR 509).

It is the clear common sense understanding of that charge that in order to find Diaz liable, the jury had to find that he was a manufacturer. Any other interpretation strains credibility. The First Circuit, however, sustained the judgment against Diaz stating the charge really meant if Alcan was found liable then Diaz "could" be found liable (Appendix A15). The Court never does explain how the jury is to exercise its discretion.

It is even more confounding when the appellate court explains that the jury instruction says that the jury "must" find Alcan manufactured the cooker. Nothing in the jury instruction remotely says such a thing:

> In the case of Ramonita Garcia Andino, we have a second defendant in addition to Alcan, Mr. Manuel Diaz. He is a named defendant, only in that case.

> . . . In order to find Mr. Manuel Diaz liable under the theory of strict liability, you must decide *his case based on the same instruction that I gave you regarding the alternate theory of recovery of strict liability* in relation to Alcan Aluminio do Brasil, S.A. Please remember, that the plaintiffs are not proceeding against Mr. Diaz, on the basis of the general theory of negligence [TR 508-09] (emphasis added).
>
> The underlined [ital.] words make clear that the jury is to find Diaz strictly liable based *"on the same instruction"* the court gave in respect to Alcan/Brasil, which instruction said that it must find that Alcan/Brasil made the cooker.

Appendix A16.

The appellate court attempts to rationalize its decision on the ground that the law in Puerto Rico makes sellers liable under a claim of strict liability. Moreover, the appellate court states that if the instructions were ambiguous, it was Petitioner's responsibility to complain. At trial, Respondents specifically asked for an instruction on seller liability, the very charge under the stream of commerce authority upon which the First Circuit opinion relies. That charge explicitly described "sellers". The trial court *did not adopt that charge*, giving further evidence that the First Circuit's recharacterization is incorrect. It was at the point that the trial court failed to adopt the Respondents' requested stream of commerce instruction that Respondents, not Petitioners, should have objected. Why should Diaz complain? The instruction is clear and quite favorable from his perspective.

The First Circuit's imposition of liability, regardless of the obvious meaning of the jury instruction and without a clear and consistent explanation is easily explained. Witout a judgment against Diaz, an American national, they know that there is little practical benefit to their exercise of jurisdiction against Alcan. A

Brazilian court would be unlikely to enforce the judgment. Thus, they are perfectly willing to impose liability against a broker whose only role was to bring buyer and seller together. The First Circuit appears to ignore the common sense understanding of the English language in order to achieve an objective, regardless of the effect of denying Diaz his rights to procedural due process. For the foregoing reasons this Court should review this case.

B. Petitioners' Rights To Procedural Due Process Were Denied Because The Jury Verdict Was Based On Speculation.

It is well established that due process requires that a jury verdict not be based on speculation. *Room v. Caribe Hilton Hotel*, 695 F.2d 5 (1st Cir. 1981). Petitioners pointed out to the First Circuit that this verdict had to be based on speculation because the jury found substantial contributory negligence and the Petitioners never introduced any evidence of contributory negligence. The reason is simple, it is logically impossible to find contributory negligence and proximate cause under Respondents' theory of the case. Even when the First Circuit tried, it failed. In attempting to reconcile the testimony of Dr. Soderstrom as to how the accidents occurred, the First Circuit tries to rationalize the inconsistency. It fails. The First Circuit states:

> The jury may have believed plaintiffs' account of the exploding pots, but thought that the plaintiffs were mistaken as to how tightly they had closed the lids; or it may have thought that vibrations on the stove loosened the lids. The jury might also reasonably have concluded that the accident would not have occurred had the second, "fusible seal" device worked properly; and it was the very sort of accident that "fusible seals" were designed to prevent—all of which would permit a finding of causation.

(Appendix A10).

This litigation was inspired by a voluntary recall of the Alcan cooker because it was learned that consumers were ignoring the instructions and opening the cookers before cooling them to relieve the pressure. The Respondents sued because they believed the cookers should have a safety interlock to prevent opening the cookers.

The First Circuit states the jury may have believed the pots exploded due to a failure of the fusible seal (A10). The function of fusible seals is to prevent cookers from blowing apart. Dr. Soderstrom's testimony was that neither the Andino nor Diaz cooker traumatically exploded as his clients claimed. Instead, he said the covers somehow came off because they vibrated off or the cookers were knocked on the floor, or in fact, his clients were trying to open them. Since Soderstrom testified the Andino and Diaz cookers didn't "explode" and since Allende said she was trying to open the cooker, it is hard to imagine how fusible seals have any relevance to this case. Moreover, there is the task of reconciling contributory negligence with a finding that the fusible seal was defective. It, of course, cannot be done.

The First Circuit's attempt at reconciling contributory negligence fares no better. They say the jury could have believed that the cookers were not closed as they should have been (Appendix A10). That is certainly possible; however, if it's true, then it is impossible to show causation. The safety interlock, even if it was on these cookers, would not be engaged unless the cooker was fully closed. Thus, its absence could not have caused the cooker to open. If the cooker was fully closed, then there could be no contributory negligence.

The First Circuit was presented with these contradictions in a Petition for Rehearing. Predictably, it did nothing. It did nothing because it had no interest in

reaching the right result. Its interest was simply in achieving a predetermined outcome, regardless of the rules or procedural rights of the parties.

This jury verdict is logically inconsistent. It cannot be sustained as a reasonable resolution of disputed facts. If this state of affairs is acceptable to this honorable Court in our legal system, it need not review this case. If this state of affairs is appalling to this Court, it must review this case.

CONCLUSION

This case is a tragic commentary on the state of the legal system in this country. The fact that it is occurring in the context of a foreign defendant makes that commentary an even greater cause of concern. Presented herein are many issues that cry out for the immediate attention of this Court.

When our courts reach out transnationally and purport to regulate conduct that is wholly outside of the United States, the potential for foreign retaliation is manifest. When appellate courts treat recent decisions of this Court as something to be ignored and simply construct expert opinions that do not exist and logically cannot exist, the credibility of the judicial system is in serious doubt. It is respectfully submitted that this Court should review the issues in this case not merely because the courts below were wrong, but because their conduct threatens to shake the very foundation of fairness upon which our legal system is built.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT

(Dated September 20, 1988)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-2111

LERCY D. BENITEZ-ALLENDE, *et al.*,
Plaintiffs-Appellees,

v.

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Defendants-Appellants.

No. 88-1089

LERCY D. BENITEZ-ALLENDE, *et al.*,
Plaintiffs-Appellants,

v.

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Hon. JOSE ANTONIO FUSTE, *U.S. District Judge*

Before

BOWNES AND BREYER, *Circuit Judges,*
and CAFFREY,* *Senior District Judge.*

FEDERICO LORA LOPEZ for plaintiffs.

LAWRENCE A. SALIBRA, II, Senior Counsel, with whom EUGENIO C. ROMERO and GOLDMAN & ANTONETTI were on brief for defendants.

BREYER, *Circuit Judge.* The three plaintiffs in these diversity cases claimed that Alcan Aluminio do Brasil, S.A. (Alcan/Brasil) manufactured defective pressure cookers, which injured them. All three won jury verdicts (based on negligence or strict liability) against Alcan/Brasil; one plaintiff also obtained a verdict against Manuel Diaz, Alcan/Brasil's Puerto Rican "sales representative." All parties appeal. We deny the defendants' claims and, with one exception, the plaintiffs' claims as well.

I

The Facts

After reading the record and drawing appropriate inferences favorable to the plaintiffs, *Gray v. New England Telephone and Telegraph Co.*, 792 F.2d 251, 253 (1st Cir. 1986), we believe the jury could have found the following basic facts:

1. Alcan/Brasil manufactures the Rochedo pressure cooker. It is a pot with a tight-fitting lid that seals food and water inside. The water, turning to steam when heated, creates pressure that helps cook the food. To

* Of the District of Massachusetts, sitting by designation.

prevent the pot from exploding, the Rochedo cooker (like many others) has two safety devices. The first is a heavy piece of metal that sits in a small valve on the cooker's lid. When steam pressure inside the cooker is low, the weight seals the valve shut; when steam pressure builds up, it lifts the metal piece, releasing steam, so that the pot will not explode. Second, the cooker contains in that part of the handle attached to the pot a "fusible seal," a piece of solid material (such as lead) that will melt should heat and pressure inside the cooker become too high. Once the seal melts, the steam can safely escape through the hole that the seal previously filled. Alcan deliberately makes the cooker very difficult to open until it is cool and the build-up of pressure has subsided; otherwise, a person who opened one might find its contents (or its top) propelled by the remaining pressure out into the room.

2. The three plaintiffs were hurt as follows: (a) On July 29, 1983, Lercy Benitez Allende was cooking gizzards in a Rochedo cooker. She set it in the sink to cool. When she removed the top, the hot meat and liquid flew out, burning her. (b) On February 6, 1984, Ramanita Andino Rosa put meat and water in the cooker, put the cooker on the stove, and left the room. Her daughter Ramonita Garcia Andino saw the cooker "move sideways" and she saw some steam came out of the plug. The cooker then exploded; the top came off; and the hot contents burned her. (c) On November 11, 1983, Carmen Cruz Diaz put beans and water in a Rochedo cooker and put it on the stove. The safety valve initially let off steam; but evidently not enough, for the lid flew off and hit her.

3. Alcan/Brasil made the cookers so that a user could open them by applying 25 pounds of force to the handle, even when the pressure inside the cooker was

dangerously high. (Underwriters' Laboratories says that cookers should seal so tightly that it takes 100 pounds of force to open them when there is steam pressure inside them.) Alcan/Brasil made the "fusible seal" so that it would not melt until the inside pressure was about four times the "maximum operating pressure." (Underwriters' Laboratories says it should melt once the pressure rises to *twice* the "maximum operating pressure.")

On the basis of these facts, the jury concluded that each cooker was defective, apparently because, in the case of Benitez Allende, it opened too easily under pressure, and, in the "exploding cooker" cases of Andino and Cruz Diaz, because the second safety device didn't work quickly enough. It also concluded that the defect caused the injuries (apparently in the case of the "exploding cookers" because the second safety device didn't let off steam in time). Also since it found the plaintiffs who used the cookers "contributorily negligent," it may have thought they had not put the lids on as tightly as they said that they had.

We turn now to the legal claims on appeal.

II

The Defendants' Appeal

A. *Jurisdiction*

1. Alcan/Brasil, conceding that Puerto Rico's "long arm" jurisdictional statute, Rule 4.7(a)(1) of the Puerto Rico Rules of Civil Procedure, stretches "up to the point allowed by the Constitution," *Industrial Siderugica v. Thyssen Steel Caribbean, Inc.*, 114 D.P.R. 548, 558 (1983) (footnote omitted), says that its contacts with Puerto Rico are so few that it does not comport with "traditional notions of fair play and substantial justice,"

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), to subject it to jurisdiction in Puerto Rico. It says that it made cookers for sale "FOB Brazil;" it did not directly advertise in the United States; it simply filled orders sent by American wholesale buyers to Brazil; it was the decision of Alcan/Brasil's *buyers*, not Alcan/Brasil, to ship the cookers to Puerto Rico and to sell them there. In its view, because these contacts are so slim, the Constitution forbids assertion of jurisdiction. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 107 S.Ct. 1026 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Hanson v. Denckla*, 357 U.S. 235 (1958).

We think the following facts sufficient to show that jurisdiction is, constitutionally speaking, permissible. First, Alcan/Brasil manufactured thousands of Rochedo cookers that, in fact, were sold in the United States. It sold 300,000 Rochedo cookers that Americans bought between 1977 and 1981; of that number, Puerto Ricans bought 240,000. Second, Alcan/Brasil knew that Americans would use its cooker in commerce in America, and it intended that result. Third, Alcan/Brasil took active steps to sell its cookers in Puerto Rico. In 1972 it hired an "export advisor," Erich Schmid, to travel to Puerto Rico to meet an American, defendant Manuel Diaz. Schmid and Diaz discussed how Alcan/Brasil could sell cookers in Puerto Rico. They agreed that Diaz could solicit orders for Rochedo cookers from Puerto Rican wholesalers and retailers: he would send orders to Alcan in Brazil; title would pass in Brazil; and the buyers would pay for transportation from Brazil to Puerto Rico. Diaz, who called himself Alcan/Brasil's "sales representative," lived in Florida, but travelled to Puerto Rico to sell Rochedo cookers and other products, at least four times a year. (In 1983, Diaz formed "Group Brazil, Inc.," a corporation, which carried on the work he previously had done on his own.)

As we read the latest opinion of the Supreme Court on the subject, *Asahi, supra*, the views of the majority are such that Alcan/Brasil's knowledge and intent of the sale of its cookers in Puerto Rico, and the number of cookers actually sold, provide a sufficient basis for the assertion of jurisdiction. In *Asahi, supra*, the Court considered whether the Constitution permitted a California court to assert jurisdiction over a Japanese firm that made tire valves, and sold them to a tire company in Taiwan, which, in turn, inserted them into tires sold (for motorcycle use) in California. Four justices would have found the "minimum contacts" ordinarily sufficient to make jurisdiction constitutional in the fact that the Japanese company "was aware" that significant amounts of its product would be sold in California and that it would benefit from those sales. They pointed out that the firm "deliver[ed] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Asahi*, 107 S.Ct. at 1037 (Brennan, J., concurring in part and in the judgment) (quoting *Woodson*, 444 U.S. at 297-98). Their appearance in California was not because "a consumer . . . took them there," *Asahi*, 107 S.Ct. at 1037 (quoting *Woodson*, 444 U.S. at 306-07); nor was that appearance "one isolated occurrence." *Asahi*, 107 S.Ct. at 1036 (quoting *Woodson*, 444 U.S. at 295). A fifth justice added that he "would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment' [of the benefits of the forum state] even though the item delivered to the forum State was a standard product marketed throughout the world." *Asahi*, 107 S.Ct. at 1038 (Stevens, J. concurring in part and concurring in the judgment).

The opinion of the remaining four justices indicates that, once the factor of the meetings between Schmid and Diaz is taken into account, all nine justices would find the assertion of jurisdiction constitutional. These four justices state that:

> The "substantial connection," . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*

Asahi, 107 S.Ct. at 1033 (plurality opinion) (emphasis in original) (citations omitted). Although they say that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State," they immediately go on to say that:

> Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.

Id. The deliberate marketing effort here consisting of the contracts between Schmid and Diaz is sufficient to satisfy this latter criterion. The fact that title to the cookers passed in Brazil is beside the point, for "[i]f *International Shoe* stands for anything, however, it is that a truly interstate business may not shield itself from suit by a careful but formalistic structuring of its business dealings." *Vencedor Manufacturing Co., Inc. v. Gougler Industries, Inc.,* 557 F.2d 886, 891 (1st Cir. 1977).

Of course, the Supreme Court in *Asahi* held that California could *not* assert jurisdiction. But, that holding rested upon special features of the case, not present here. Those features made *Asahi* "one of those rare cases in which 'minimum requirements inherent in the concept of "fair play and substantial justice" ... defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.' " *Asahi*, 107 S.Ct. at 1035 (opinion of Brennan, J.) (citations omitted). Those special circumstances were: (1) California's interest in the controversy was limited, for the dispute concerned *only indemnification* of a Chinese manufacturer by a Japanese supplier; (2) the distance to California was great, and the legal system was different; and (3) other forums likely had a greater interest in, and knowledge about the indemnification issue, which concerned contracts and sales made in the Orient. Here the forum's interest is in protecting its citizens from injuries caused by defective products; the distance is less great; the legal system is roughly similar, and Puerto Rico has as much interest as any other political forum in the controversy. *See McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957). All of this is to say that *Asahi's* special circumstances for denying jurisdiction are not present here, while the Court's reasoning in *Asahi* clearly implies that the district court's assertion of jurisdiction here is constitutionally permissible.

2. Alcan/Brasil also argues that the Constitution's "foreign commerce clause," U.S. Const. Art. I, §8, (giving Congress the power to regulate commerce with foreign nations) forbids Puerto Rico from asserting jurisdiction. We do not see how this is so; indeed, every state to our knowledge permits its citizens to bring tort actions against foreign manufacturers who send defective

products into their jurisdictions. *See* Annotation, *Products Liability: In Personam Jurisdiction Over Nonresident Manufacturer Or Seller Under "Long-Arm" Statutes,* 19 A.L.R. 3d 13 (1968 & Supp. 1987) and cases collected therein. Appellants cite *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), but that case concerned California's power to tax a Japanese cargo container ship which spent a portion of the year at a California dock. The case raised the question of the extent to which an individual state may tax "instrumentalities of commerce" such as cargo containers, *Japan Line,* 441 U.S. at 442, railroad rolling stock, *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18 (1891), aircraft, *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization,* 347 U.S. 590 (1954) and barges, *Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169 (1949). This case does not involve "instrumentalities of commerce," a matter the Constitution grants Congress specific authority to regulate. U.S. Const. Art. I, §8, cl. 3. It concerns tort law, a subject matter that historically belongs to the states. Any analogy between this case and *Japan Line* strikes us as too farfetched to warrant further consideration.

B. *The Evidence-Related Claims*

1. Both defendants (Alcan/Brasil and Diaz) argue that the evidence was not sufficient to support the Andino and Cruz Diaz verdicts. They seem to rest their claim on the following circumstances: (1) the users testified that they closed the cookers' lids tightly; (2) the plaintiffs' expert testified that explosion of a tightly closed cooker would deform the pot or lid; and (3) the pot and lid of Cruz Diaz's cooker were not noticeably deformed, while the pot and lid of Andino's cooker were only slightly deformed. They conclude because of these

three facts (and the fact that plaintiff's expert did not discuss the issue of causation in detail) that the jury could not have found that a safety mechanism failure caused the plaintiffs' injuries.

Their conclusion, however, does not follow from these premises. The jury may have believed plaintiffs' account of the exploding pots, but thought the plaintiffs were mistaken as to how tightly they had closed the lids; or it may have thought that vibrations on the stove loosened the lids. The jury might also reasonably have concluded that the accident would not have occurred had the second, "fusible seal" device worked properly; and that it was the very sort of accident that "fusible seals" were designed to prevent—all of which would permit a finding of causation.

The defendants add that the accident was impossible because those plaintiffs testified that they saw steam escaping through the first safety device, and because plaintiff Benitez Allende said she cooled the cooker before opening it. The jurors, however, may have believed that the accident did occur as plaintiffs said, but that the first safety device did not work properly because not enough steam escaped, or, they may have thought that plaintiffs were wrong about steam escaping. They may have thought that the cooker was not as cool as Allende Benitez thought when she opened it. All of these matters are for the jury to decide.

2. The defendants claim that the district court should have granted a motion for summary judgment that they made on August 9, 1987. That motion had two parts. First, it pointed to the contradictions in testimony that we mentioned in subsection B.1 above. It pointed out that it cannot be true that plaintiffs' expert's testimony was correct *and* that the cooking pots were

not deformed *and* that the lids were on tight when the cookers exploded; it cannot be true that the Benitez Allende cooker had cooled to room temperature *and* that the food flew out when Benitez Allende opened it. As we said, however, it was up to the jury to decide how to resolve any such conflicts. It was up to the jury to decide just where and how the plaintiffs' (or expert's) testimony was correct or mistaken. The jury, in fact, likely reached the commonsense conclusions that the lids were not on tightly or that they were jarred loose; and that the pressure of the cooker had not fallen. The record at the time of the summary judgment motion in these respects presented "genuine" and "material" issues of fact. Fed. R. Civ. P. 56.

Although plaintiffs' expert's deposition was somewhat vague and conclusory, Rule 56 does not *require* the district court to grant summary judgment in such circumstances; rather, the court may choose, in its discretion, to "give the parties an opportunity to fully develop the case." *Marcus v. St. Paul Fire & Marine Ins. Co.*, 651 F.2d 379, 382 (5th Cir. 1981), such as the opportunity to clarify vague statements by proceeding to trial. *See* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* §2728 nn. 11, 12 (1983 & Supp. 1987).

3. The second claim that defendants' summary judgment motion made was that the court should not permit plaintiffs' expert, Dr. Kenneth G. Soderstrom, to testify; and, without his testimony, plaintiffs could not prove their case. Assuming this latter point for the sake of argument, we consider whether or not the district court should have permitted Dr. Soderstrom to testify specifically in respect to his opinions about the likely defects in the plaintiffs' cookers. Defendants argue here

(as they argued to the district court) that Soderstrom's testimony should be excluded because at his deposition only two days before the close of discovery (which had taken place over a period of 26 months), he would not offer "a complete judgment" about how the particular cookers "related to the injuries alleged"; he said he had not "seen yet the full depositions of the people that were involved in those accidents" and that prior to the deposition, he "wasn't examining the pots." Defendants say that plaintiffs had more than adequate time to supply their expert with their full story and with the pots. Their failure to do so, and Dr. Soderstrom's consequent failure to provide a complete, detailed account of his views at the deposition warrant exclusion of his later, more detailed, trial testimony as an appropriate sanction.

The district court, however, before permitting Dr. Soderstrom to testify, established that, in his deposition, he provided the defendants with the essence of his views (that the pots could be opened too easily under pressure; that the second safety device did not melt quickly enough). The court also told the defendants it would give them "plenty of leeway to deal with [Soderstrom] and ask him why it is when you deposed him he had no opinion." Further, Soderstrom's uncertainty did not reflect *only* plaintiffs' failure to comply with the court's discovery schedule. The defendants too were somewhat dilatory. They did not supply plaintiffs with tests that Alcan/Brasil commissioned from an independent laboratory—tests about the cookers' tendency to explode—until plaintiffs obtained a specific court order, two months after Soderstrom's deposition and the previously designated "close" of discovery, and just one month before trial. On these facts, the district court could have decided that the sanction of exclusion was not warranted.

Under Fed. R. Civ. P. 37(b), the district court "may," when faced with parties who disobey discovery rules, "make such orders in regard to the failure as are just," such as excluding testimony or establishing facts as proven before trial, Rule 37(b)(2)(A), (B); *Basch v. Westinghouse Electric Corp.*, 777 F.2d 165, 174-75 (4th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986); *Davis v. Marathon Oil Co.*, 528 F.2d 395, 403 (6th Cir. 1975), *cert. denied*, 429 U.S. 823 (1976), or even dismissing a claim entirely. Rule 37(b)(2)(C); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Ganapolsky v. Keltron Corp.*, 823 F.2d 700, 701 (1st Cir. 1987). Rule 37(b)'s permissive language gives the district court discretion *not* to impose sanctions as well. Courts, including this one, have consistently held that such sanction decisions are primarily for the district court, not this court. *National Hockey League, supra; Ganapolsky, supra.* And, given the circumstances, we cannot say that the district court's decision not to impose sanctions exceeded its lawful powers.

4. The defendants argue that the introduction into evidence of the "Battelle Report" violates Fed. R. Evid. 407, a rule that, in relevant part, says:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

Alcan/Brasil commissioned the Report on its Rochedo cookers in 1982 before these accidents took place. But, because it used the report's results to help plan a "voluntary" recall of its defective cookers (in cooperation with the consumer products Safety Commission), it claims that the Report was part of an effort to improve the safety of its product, and that the rule, therefore, forbids its admission.

We do not agree. Rule 407 prevents the admission of evidence of what its title refers to as "Remedial Measures." The Battelle Report itself describes the results of a "diagnostic test," not remedial measures. It makes no reference to a product recall or to specific accidents; it discussed the features of the cooker; it preceded repairs. Thus, *by itself,* the Battelle Report "would" not "have made the event less likely to occur." It was more an "internal investigatory report" of the sort not protected by Rule 407. *See, e.g., Rocky Mountain Helicopters, Inc. v. Bell Helicopters,* 805 F.2d 907, 918 (10th Cir. 1986) (upholding district court's admission into evidence of helicopter manufacturer's post-accident "stress test" of potentially defective part because "[i]t would strain the spirit of the remedial measure prohibition in Rule 407 to extend its shield to evidence contained in post-event tests or reports"); *Westmoreland v. CBS, Inc.,* 601 F. Supp. 66, 67-68 (S.D.N.Y. 1984) (internal investigatory report following allegedly libelous broadcast not "remedial measure" rendered inadmissible by Rule 407). In any event, the appellants stipulated, in the pre-trial order, to the truth of "the facts in the Battele [sic] study." Given this stipulation, even if the admission of the Battelle Report were improper, any error would be harmless.

5. The defendants argue that the district court should not have admitted a 1975 Underwriters' Laboratories report into evidence. The report discusses the characteristices of a 4-quart and a 6-quart pressure cooker. But, defendants claim, plaintiffs did not show that the 4-quart cooker it describes was the same kind that the plaintiffs used; and, they add, the information about the 6-quart cooker was irrelevant. The Underwriters' Laboratories report on its face, however, appears to describe a typical 4-quart cooker; and that

fact makes the safety feature it mentions relevant to the present case. Also, when Dr. Soderstrom testified, the district court restricted his comments to the part of the report reviewing the 4-quart cooker. The trial court also allowed the appellants to cross-examine Dr. Soderstrom about the relevance of the report. We can find no legal error. Fed. R. Evid. 403.

C. Diaz's Liability As A "Broker"

Appellant Diaz argues that he should not be found liable to plaintiff Garcia Andino because (1) the court's charge to the jury "specifically required the jury to find that Diaz '*manufactured*' the cookers . . . in order to establish strict liability," and (2) the "record contains no evidence that Diaz was a manufacturer of the cookers." The fatal flaw in this argument lies in the first proposition. The court did *not* charge the jury that it could find Diaz strictly liable if it found that *Diaz* manufactured the cooker; rather, the court charged the jury that it could find Diaz strictly liable if it found that *Alcan/Brasil* manufactured the cooker.

The court's charge, in relevant part, reads as follows:

> In order to [recover] under the strict liability theory of products liability principles, plaintiffs must establish three essential elements, which are the following: First, that the defendant, Alcan Aluminio do Brasil, S.A., manufactured the pressure cookers, which at the time, that Alcan manufactured them, were in a defective condition; such that they failed to meet the average quality of similar products. Second, that the plaintiffs, in fact, suffered injuries, as ultimate users of these pressure cookers. And third, that the defective condition of said pressure cookers proximately caused the injuries to the plaintiffs. If you find that plaintiffs have established each of these elements by a preponderance of the

> evidence, then you may find for the plaintiffs. Otherwise, if you are not satisfied that the above-mentioned elements were proved by a preponderance of the evidence, then you will find for the defendants. [Tr. 504] (emphasis added).
>
> . . .
>
> In the case of Ramonita Garcia Andino, we have a second defendant in addition to Alcan, Mr. Manuel Diaz. He is a named defendant, only in that case .... In order to find Mr. Manuel Diaz liable under the theory of strict liability, you must decide his case based on the same instruction that I gave you regarding the alternate theory of recovery of strict liability in relation to Alcan Aluminio do Brasil, S.A. Please remember, that the plaintiffs are not proceedings against Mr. Diaz, on the basis of the general theory of negligence. [Tr. 508-09] (emphasis added).

The underlined words make clear that the jury is to find Diaz strictly liable based "on the same instruction" the court gave in respect to Alcan/Brasil, which instruction said that it must find that Alcan/Brasil made the cooker.

This instruction seems correct. As far as we can tell, the parties do not dispute the fact that Diaz was a broker or "sales representative," a middleman in the distribution chain. Although Puerto Rico has not adopted the whole common law of torts, *Valle v. American International Insurance Co.*, 108 D.P.R. 735 (1979), it has chosen to adopt the principles of strict liability laid out in *Restatement (Second) of Torts* §402A (1965). *Montero Saldana v. American Motors Corp.*, 107 D.P.R. 501 (1978); *Mendoza v. Cerveceria Corona, Inc.*, 97 P.R.R. 487, 499 (1969). And, courts following that section have routinely found "sales representatives" strictly liable for distributing defectively manufactured products. *See, e.g., Little v. Maxam, Inc.*, 310 F. Supp.

875 (S.D. Ill. 1970); *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (Cal. Ct. App. 1968); *Kirby v. Rouselle Corp.*, 108 Misc. 2d 291, 437 N.Y.S.2d 512 (N.Y.Sup. Ct. 1981); *Zamora v. Mobil Corp.*, 104 Wash. 2d 199, 704 P.2d 584 (Wash. 1985). If, in fact, Diaz believed he was not part of the distribution chain, or if he disputed the court's application of the law in the instruction making him automatically liable should Alcan/Brasil prove liable, or if he believed the instruction otherwise ambiguous or erroneous, he should have objected in the trial court, or requested a different instruction and appealed, pointing directly to the overruled objection or denied request. *Elwood v. Pina*, 815 F.2d 173, 175-76 (1st Cir. 1987). We can find no such objection or request; and for reasons just mentioned, there is no "plain error." *Elwood*, 815 F.2d at 176; *Brown v. Freedman Baking Co., Inc.*, 810 F.2d 619 (1st Cir. 1987).

III

The Plaintiffs' Appeal

A. Consumer Products Safety Act

The plaintiffs appeal the district court's dismissal of a claim they asserted under the Consumer Products Safety Act, 15 U.S.C. §§2051-82 (1982 & Supp. I 1983). In that claim they pointed to a rule of the Commission which requires manufacturers to report to the CPSC any information indicating their products are defective. 16 C.F.R. Part 1115, §§1115.1—.22 (1988). They also pointed to 15 U.S.C. §2072(a), which says that anyone who "sustain[s] injury" as a result of a "knowing . . . violation" of a Commission rule, may bring an action in federal court to recover "damages sustained, and may, if the court determines it to be in the interest of justice,

recover costs of suit, including reasonable attorneys fees." Presumably plaintiffs hope that, through this claim, they can recover the attorney's fees denied them in their Commonwealth tort suit.

Although some district courts have permitted statutory actions for "failure to report," *see, e.g., Wilson v. Robertshaw Controls Co.*, 600 F. Supp 671 (N.D. Ind. 1985), the only circuit court to rule on the question, the Eighth Circuit, has not. *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986). The Eighth Circuit specifically held that Congress did not, in §2072(a), create a "private right of action" based upon violation of the Commission's *procedural reporting rule*, a rule that basically repeats and elaborates the reporting requirements contained in a different statute, 15 U.S.C. §2064(b). The Eighth Circuit pointed out that to interpret §2072 to allow this type of private action would be odd, technically speaking, for the language of §2072 provides a private right of action to enforce the Commission's "rules" and "orders;" it says nothing about enforcing provisions of the statute itself, such as the reporting requirements of §2064(b). The parties point to nothing in the legislative history suggesting that Congress intended a private right of action to arise whenever a manufacturer violates a statutory reporting requirement. Yet, to permit such an action would have broad substantive implications. It would mean plaintiffs could bring many (perhaps nearly all) products liability suits in federal court and obtain attorney's fees by alleging that the manufacturer of the defective product should have told the Commission about the defect. It seems unlikely Congress would have intended to bring about such an important result without even mentioning the matter. We see no need to repeat here the entire Eighth Circuit's analysis. We agree with its result for the reasons it has set forth. *Drake, supra.*

B. Attorneys Fees

The plaintiffs appeal the district court's denial of their request for attorney's fees—fees that are to be awarded under Puerto Rico's law only when the district court finds a party "obstinate." P.R. R. Civ. P. 44.1(d); *Fernandez Marino v. San Juan Cement Co.*, 87 J.T.S. 37 (1987). The district court here found that the defendants were not obstinate; and in doing so, it acted within the bounds of its lawful authority. Rule 44.1(d); *Fernandez, supra.*

C. Amending the Complaint

Plaintiffs Cruz Diaz and Benitez Allende appeal the denial of their motions, made on December 16, 1985, to amend their complaints to add Manuel Diaz as a defendant. They argue that the district court allowed plaintiff Andino's similar motion to amend her complaint and that their circumstances are indistinguishable.

The circumstances are as follows. The three plaintiffs filed their complaints at different times between July 26, 1984 and January 25, 1985. In mid-December 1985, all three moved to amend their complaints to add Diaz. They said that they had originally thought Diaz was president of a corporation called Group Brasil, which distributed the cookers. They had included Group Brasil as defendant in the lawsuit; Diaz was aware of the proceedings. They added that recently they had learned that Diaz had acted *individually* as a distributor prior to 1983 when he formed Group Brasil. Therefore they wished to sue him individually.

Diaz opposed these motions to add him as a defendant by arguing that, as a "broker," he was not liable under Puerto (line illegible) stated in Part II.C, *supra*, this argument was likely incorrect.)

In late November 1986, the district court denied all three plaintiffs' motions to amend. The district court accepted Diaz's (legally invalid) broker-liability argument, but it added that, in any event, the proposed actions against Diaz were time-barred under Puerto Rico's statute of limitations, 31 L.P.R.A. §5298 (1968), which allows parties only one year after the date of injury to bring a tort complaint. Since all three plaintiffs had filed a complaint within one year of injury, the district court must have thought that in respect to Diaz, the relevant "filing" date was the date of the "Motion to Amend." That is to say, the court must have thought the amendments would not "relate back" to the date of the complaint. *But see* Fed. R. Civ. P. 15(c).

On December 8, 1986, all three plaintiffs, pointing to Fed. R. Civ. P. 15(c), asked the court to reconsider its ruling. In an opinion and Order dated January 21, 1987, the district court reconsidered in respect to Andino, and granted Andino's request to amend her complaint to sue Diaz. The court wrote:

> Federal Rule of Civil Procedure 15(c) permits an amendment adding a party to relate back to the date of the original pleading if three conditions are met: (1) the claims against the new party arise out of the same occurrence as the claims in the original pleading, (2) the new party received "notice of the institution of the action" before the limitations period expired, and (3) the new party "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 102 (1st Cir. 1979), citing C. Wright & A. Miller, *Federal Practice and Procedure* sec. 1498 at 507 (1971).

> The institution of the action serves as constructive notice of the parties added after the limitations period expired, when the original and added parties are so closely related in business or other activities that it is fair to presume the added parties learned of the institution of the action shortly after it was commenced. *Id.*, at 102-03. We find that Diaz, as president of Group Brazil, had such constructive notice and, therefore GRANT plaintiffs' motion to amend the complaint to add him as a defendant.

Opinion and Order, *Ramonita Garcia Andino v. Alcan Aluminio do Brasil S.A.*, Civil No. 85-0256 (JAF) (D.P.R. January 21, 1987) (slip op.) at 6-7. *See also Serrano v. Torres*, 764 F.2d 47, 49-50 (1st Cir. 1985). On March 18 and 19, 1987, however, the district court denied the apparently identical motions of plaintiffs Cruz Diaz and Benitez Allende.

Like Cruz Diaz and Benitez Allende, we can find no reason why the district court would grant Andino's motion and deny theirs. Although Rule 15(a) generally commits the decision of motions to amend to the discretion of the trial court, *Best Canvas Products and Supplies, Inc. v. Woof Truck Lines, Inc.*, 713 F.2d 618 (11th Cir. 1983), it also says that permission to amend should be "freely given when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182 (1962). The "policy of Rule 15(a) in liberally permitting amendments to facilitate determination of claims on the merits circumscribes the exercise of the trial court's discretion; thus '[u]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial.' " *Epsy v. Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984) (citation omitted); *Foman v. Davis*, 371 U.S. at 182. The district court explained why the "statute of limitations" issue was irrelevant; it found no other "substantial reason" for denying the motions to

amend. Hence, we conclude that it should have granted the Cruz Diaz and Benitez Allende motions, as it did Andino's.

The district court will remain free, on remand, to determine whether in the changed circumstances of the case, amendment is no longer appropriate.

The judgments of the district court against Alcan/Brasil and Diaz are Affirmed.

The judgments insofar as they disallow the claims of Cruz Diaz and Benitez Allende against Manuel Diaz are vacated and the cases are remanded for proceedings consistent with this opinion.

JUDGMENT ENTRY OF THE DISTRICT COURT

(Filed October 30, 1987)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 84-1914 (JAF)
Civil No. 84-2338 (JAF)
Civil No. 85-0256 (JAF)

LERCY D. BENITEZ-ALLENDE and NESTOR JAVIER MATTA, both personally and representing the conjugal partnership by both composed, and RAFAELA ALLENDE,

Plaintiffs,

v.

ALCAN ALUMINIO DO BRASIL, S.A.,
Defendant.

JUDGMENT

Based on verdicts returned by the jury on October 29, 1987, at 8:29 P.M., judgment is hereby entered as follows:

1. In Civil No. 84-1914 (JAF), judgment is entered against Alcan Aluminio do Brasil, S.A., in favor of Lercy D. Benitez Allende, in the amount of $22,500.00.

2. In Civil No. 84-2338 (JAF), judgment is entered against Alcan Aluminio do Brasil, S.A., in favor of:

(a) Carmen Cruz Diaz, in the amount of $40,000.00;

(b) Elpidio Rivera Martinez, in the amount of $30,000.00.

3. In Civil No. 85-0256 (JAF), judgment is entered against Alcan Aluminio do Brasil, S.A. and Manuel Diaz, jointly and severally, in favor of:

(a) Ramonita Garcia Andino, in the amount of $40,000.00;

(b) Ramonita Andino Rosa, in the amount of $18,000.00.

4. Judgment is entered dismissing the complaint as to:

(a) Nestor Javier Matta and Rafaela Allende, in Civil No. 84-1914 (JAF);

(b) Aurea Garcia Andino, in Civil No. 85-0256 (JAF).

Costs to plaintiffs.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 30th day of October, 1987.

/s/ JOSE ANTONIO FUSTE
U. S. District Judge

DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN ALCAN ALUMINUM LIMITED V. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, *ET AL.*

In the

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-2289

ALCAN ALUMINIUM LIMITED,
Plaintiff-Appellant,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, *et al.*,
Defendants-Appellees.

No. 87-2295

IMPERIAL CHEMICAL INDUSTRIES PLC,
Plaintiff-Appellant,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, *et al.*,
Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Nos. 84 C 6932 & 84 C 8902—ANN C. WILLIAMS, *Judge.*

Argued January 20, 1968—Decided October 19, 1988*

Before CUDAHY, FLAUM and RIPPLE, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Alcan Aluminium Limited ("Alcan") and Imperial Chemical Industries PLC ("Imperial"), two foreign corporations with American subsidiaries that do business in California, appeal from the district court's dismissal of their constitutional challenge to California's franchise tax. The district court found that the parent companies were injured only in their capacity as shareholders and therefore lacked standing under the well established rule that shareholders must ordinarily demonstrate a direct and independent injury to bring suit. *Alcan Aluminium Ltd. v. Franchise Tax Bd.,* Nos. 84 C 6932, 84 C 8902, mem. op. at 8-10 (N.D. Ill. July 29, 1987). We find that Alcan and Imperial have incurred injuries that are sufficiently direct and independent of the injuries incurred by their subsidiaries to confer standing. We therefore reverse and remand.

I.

Appellants are foreign corporations with majority interests in domestic companies that conduct business in California. Alcan, a Canadian company, is the sole stockholder of Alcan Aluminium Corporation

* This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing in banc because of the arguable conflict with the decisions of the Ninth Circuit in *EMI Ltd. v. Bennett,* 788 F.2d 994 (9th Cir. 1984) and *Shell Petroleum, N.V. v. Graves,* 709 F.2d 593 (9th Cir. 1963).

("Alcancorp"), an Ohio corporation with operations in California,[1] Imperial, an English holding company, owns over fifty percent of ICI Americas, Inc. ("Americas"), a Delaware corporation that also conducts business in California. California's Franchise Tax Board ("FTB") has assessed, or is in the process of assessing, taxes against both Alcancorp and Americas under California's franchise tax law. *See* Cal. Gov't Code §§15700-15708 (West 1980 & Supp. 1988); Cal. Rev. & Tax Code §26422 (West 1979).[2]

California does not employ conventional geographic or transactional accounting techniques to determine the locally taxable income of California businesses that transact business with affiliated companies outside the state. Instead, California, like a number of other states, employs a unitary tax approach—known in the California Code as the "unitary business/formula apportionment method." FTB first determines the scope of the "unitary business" in which a California corporation participates with affiliated companies and calculates the total earnings of this unitary enterprise. It then computes an

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[1] When Alcan initiated this action for declaration judgment in August 1964, Alcancorp was directly owned by Alcan Aluminium of Canada, Ltd., which was in turn owned by Alcan Aluminium Limited. A subsequent corporate reorganization renamed Alcan Aluminium of Canada, Limited; it is now called Alcan Aluminium Limited. The entity that was called Alcan Aluminium Limited is now Alcan Aluminium Holdings Limited. This change has no bearing on the issues and we follow the parties' sensible convention of using the original name (shortened to "Alcan") for the foreign parent.

[2] The stipulated facts reveal that by the end of 1965, the FTB had computed Americas' taxes under the unitary apportionment method for the years 1972 through 1981, and was completing its audits of Alcancorp's California returns for the years 1965 through 1981. The record does not reveal the current status of Alcancorp's and Americas' state-level challenges.

allocation fraction for each affected taxpayer. This fraction is an unweighted average of three ratios, the ratios of California payroll to total payroll, California property value to total property value and California sales to total sales. Multiplying a corporation's allocation fraction by the total income of the unitary business in which it participates yields that corporation's taxable income for purposes of the franchise tax. Cal. Rev. & Tax Code §§25128-25137 (West 1979). The Supreme Court has repeatedly rejected claims, in cases involving domestic parent companies, that this three-factor method violates the commerce clause or foreign commerce by unfairly overstating the income attributable to operations in the taxing state. *See Container Corp. v. Franchise Tax Bd.*, 468 U.S. 159, 180-84 (1983); *Mobil Oil Co. v. Commissioner of Taxes*, 445 U.S. 425, 488-89 (1980); *see also Moorman Mfg. Co. v. Bair*, 487 U.S. 257, 271-75 (1978). However, the Court has expressly left open the issue that appellants now seek standing to raise; whether application of the unitary tax to domestic subsidiaries of foreign corporations violates foreign commerce clause prohibitions on multiple taxation and the impairment of federal uniformity. *See Container Corp.*, 563 U.S. at 189 n.26 & 195 n.32;; *see also Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446-51 (1979) (discussing concerns about multiple taxation and the national uniformity that are peculiar to foreign commerce context). These questions have prompted heated diplomatic protest and threats of retaliation by the domiciliary countries of affected foreign corporations.

Alcancorp and Americas, appellants' subsidiaries, are in the midst of contesting the FTB's assessments before California administrative officials and courts. The Tax Injunction Act, 28 U.S.C. §1341 (1982), prohibits the subsidiaries from obtaining review of the

constitutionality of the tax by a federal court until they have exhausted their California appeals.[3] The FTB maintains that the subsidiaries have standing to challenge the franchise tax under the foreign commerce clause in California court and, ultimately, in the United States Supreme Court. Appellants seem to assert, though their position on this point is confused and perhaps inconsistent, that their domestic subsidiaries have no standing to challenge the constitutionality of the franchise tax.[4] In any event, appellants have not given us any convincing reason to doubt that the California courts will entertain Alcancorp's and Americas' foreign commerce clause arguments; so we must proceed on the (perhaps not wholly clear) assumption that the *subsidiaries* can press these constitutional claims in state court.

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[3] The Act states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341 (1962).

[4] In its opening brief, Imperial stated that Americas "is not engaged in foreign commerce and cannot raise a claim under the Commerce Clause . . . because it has suffered no injury to its foreign commerce." Brief of Plaintiff-Appellant Imperial Chemical Indus. PLC at 14. The FTB's response contested Imperial's idiosyncratic view that Americas could be uninvolved in foreign commerce while Imperial was engaged in foreign commerce by virtue of transactions with Americas. Brief of Appellees at 23. Imperial's response, that "Americas' foreign commerce is minimal," that the tax "does not directly affect Americas' foreign trade" and that Imperial suffers "the greater loss" from any diminution in trade caused by the tax, do not salvage its position. Reply Brief of Plaintiff-Appellant Imperial Chemical Indus. PLC at 13-14. Nor does the non sequitur that Alcan threw into the breach: '[any] burdens on foreign commerce, . . . must of necessity be burdens exclusively on Appellant, not its U.S. subsidiary, since those burdens relates exclusively to the inclusion of Appellant and its non-U.S. subsidiary's foreign activities into the California tax base." Reply Brief of Appellant Alcan Aluminium Limited at 7. Appellants were no more successful in their attempts to illuminate their one-way theory of foreign commerce at oral argument.

This case requires us to revisit an issue identified but left unresolved in *Alcan Aluminium Ltd. v. Department of Revenue*, 724 F.2d 1294 (7th Cir. 1984) ("*Alcan II*"). *Alcan II* dismissed Alcan's challenge to Oregon's unitary tax as unripe for adjudication until such time as Oregon actually determined that Alcancorp owed franchise taxes. Although we stressed that the dismissal on ripeness grounds implied no position "as to whether appellant will have standing to challenge appellees' actions if appellees do assess Alcancorp as part of a unitary business including appellant," we stated in dictum that if Alcan's factual allegations were taken as true neither Alcan's shareholder status nor the Tax Injunction Act's bar on federal district court suits for declaratory or injunctive relief against state taxes would prevent Alcan from obtaining standing once the dispute became ripe. *Id.* at 1299. The case before us places the standing issue, an issue which may have important implications for the growing conflict between the United States and nations where parent corporations affected by unitary taxes are domiciled, squarely before this court.

II.

Standing doctrine imposes two types of restrictions on litigants seeking access to federal courts: "constitutional limitations on federal court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *see Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). The FTB does not seriously contest plaintiffs' claims that their interest in challenging the California franchise tax satisfies the case or controversy requirement of article III, section 2. The plaintiffs' ownership interests in their domestic subsidiaries alone, considered apart from the

direct harms they incur as participants in foreign commerce (discussed below), clearly give them "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The dispute here centers on the more elusive, prudential guidelines that the "Court [has] developed, for its own governance in the cases confessedly within its jurisdiction." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1986) (Brandeis, J., concurring). The prudential aspect of the standing inquiry, like the constitutional aspect, derives fundamentally from "concern about the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498; *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978); *Peoples Gas, Light & Coke Co. v. United States Postal Serv.*, 658 F.2d 1182, 1195 (7th Cir. 1981). No single formula has been devised for resolving all standing issues in the manifold contexts in which they arise; nothing in the Supreme Court's recent standing decisions belies the observation, now nearly two decades old, that "[g]eneralizations about standing to sue are largely worthless as such." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970).

Two large and familiar features of the jumbled standing landscape stand out as useful guideposts for our inquiry in this case. First, it is clear that a plaintiff may only bring suit to vindicate a particularized, personal interest. Generalized grievances do not confer standing, nor do claims to relief resting on "the legal rights or interests of third parties." *Warth*, 422 U.S. at

499; *see Tileston v. Ullman*, 818 U.S. 44 (1943). This principle of judicial self-restraint prevents courts from interfering unnecessarily in "abstract questions of wide public significance" that "other governmental institutions may be more competent to address." *Warth*, 422 U.S. at 500.

Second, it is clear that the courts must look to congressional intent when they seek to place appropriate limits on federal judicial power. In the context of administrative action challenged as violative of the governing statutory standard, the Supreme Court has held that "at bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Clarke v. Securities Indus. Ass'n*, 107 S. Ct. 750, 758 (1987); *see Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984). A corollary, more pertinent here, holds that standing to bring constitutional challenges to state actions may be precluded by an express or implied congressional prohibition. In *California v. Grace Brethren Church*, 457 U.S. 393 (1982), for example, the Supreme Court held the Tax Injunction Act, which expressly prohibits taxpayer suits for injunctive relief in order to prevent federal courts from interfering with the assessment of state taxes, impliedly prohibits suits for declaratory relief as well. *Id.* at 407-11.

This case, as we shall see, also implicates judge-made equitable principles under which federal courts have found disputes over state taxes to be nonjusticiable (though typically under the rubric of abstention rather than lack of standing). These principles are distinct from, though consistent with, the comity concerns that Congress sought to protect through the Tax Injunction Act. *See Fair Assessment in Real Estate Ass'n, Inc. v.*

McNary, 454 U.S. 100 (1981). The issue is whether, in the circumstances of this case, the equitable principles that favor deference to states on revenue questions outweigh the countervailing obligation of the federal courts to provide a forum for a litigant with no effective state remedy.

III.

A.

The FTB's arguments against standing purport to rely on these prudential standing principles. First, the FTB argues that the injuries of which Alcan and Imperial complain are indirect injuries incurred by the appellants in their capacity as shareholders of Alcancorp and Americas. The FTB contends that the prudential bar on standing to enforce third parties' rights encompasses a well established prohibition on shareholder suits to redress injuries to their corporations. Longstanding equitable restrictions on shareholder suits, the FTB points out, generally prohibit shareholders from initiating actions to enforce the rights of the corporation unless they can demonstrate that they have taken appropriate steps to persuade the corporate managers to pursue the same action and that the managers refused for reasons other than good faith business judgment. *See Twoky v. First Nat'l Bank*, 758 F.2d 1185, 1194 (7th Cir. 1985); *Swanson v. Traer*, 249 F.2d 854, 859-61 (7th Cir. 1957); *see also* Fed. R. Civ. P. 23.1 (requirements for bringing shareholder derivative action in federal court). An exception to this rule exists, however. Shareholders with direct, personal interests in a cause of action can bring suit even if the corporation's legal rights and obligations are also implicated. *Simcox v. San Juan Shipyard, Inc.*, 754 F.2d 430, 438 (1st Cir. 1985); *Buschmann v. Professional Men's Ass'n*, 405 F.2d 659, 661-63 (7th Cir.

1969); *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968) (stockholder may bring an individual action "where the wrong itself amounts to a breach of duty owed to the stockholder personally").

This case requires us to determine whether Alcan's and Imperial's particular injuries are sufficiently direct and personal to confer standing. The parent companies contend that they are directly injured because they incur significant accounting costs as a result of California's reliance on a unitary tax base, because California effectively taxes the income of overseas affiliates that is already subject to taxes in other jurisdictions and because the tax impairs their subsidiaries' value as instrumentalities of foreign commerce. The FTB counters that each of the harms described by the appellants was incurred indirectly, through the parent corporations' status as shareholders in Alcancorp and Americas.

To determine the scope of the exception, we must consider the nature and purposes of the shareholder standing rule. Limitations on shareholder derivative suits in federal courts were originally imposed to curb the use of shareholder suits as a means of invoking diversity jurisdiction when the corporation itself could not. *See Hawes v. City of Oakland*, 104 U.S. 450, 459-60 (1881); *see generally 7C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure* §1821 at 10-13 (1986) (describing context of the *Hawes* holding and its subsequent codification in federal rules). Later, the Supreme Court indicated that the bar on shareholder standing also protects the rights of shareholders who control a majority of voting shares to make binding decisions about the enforcement of corporate rights. *See, e.g., Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U.S. 455, 463 (1908) ("It is not a trifling thing for a stockholder to

attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs."); *see also Swanson*, 249 F.2d at 859-60.[5] Courts and commentators have since recognized that the deterrence of "strike suits," shareholder derivative actions brought for the purpose of eliciting lucrative settlements from management rather than to force the corporation to pursue some viable cause of action, is an important objective underlying the shareholder standing requirements. *See, e.g. Lewis v. Curtis*, 671 F.2d 779, 788 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982); *Brink v. Dalesio*, 667 F.2d 420, 428 (4th Cir. 1981); Note, *Trust Beneficiary Standing in Shareholder Derivative Actions*, 39 Stan. L. Rev. 267, 273-74 (1986).

In a number of more recent cases, federal courts have denied individual standing to shareholders notwithstanding that these shareholders controlled a majority of voting shares and that subject matter jurisdiction did not depend on the individual plaintiff's residence. In *Gregory v. Mitchell*, 634 F.2d 199 (5th Cir. 1981), for example, controlling shareholders in a bank were prevented from suing as individuals under 42 U.S.C. section 1983 for alleged discriminatory treatment by state regulators. *Accord Jones v. Niagara Frontier Trans. Auth.*, 836 F.2d 731, 736 (2d Cir. 1987); *Erlich v. Glasner*, 418 F.2d 226 (9th Cir. 1969); *see also, e.g., Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429,

[5] Justice Brandeis' concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 342-44 (1986), relied in part on the rights of shareholder majorities to support his contention that the shareholder plaintiffs lacked standing. Chief Justice Hughes' lead opinion (which, like Justice Brandeis' concurrence, garnered four votes) found standing based on stockholders' allegations that corporate directors' breached a duty to stockholders by failing to oppose illegal government action. *Id.* at 318-23. Both opinions looked to the purposes for limiting shareholder standing and the particular facts of the case at hand to assess the status of the plaintiffs in that case.

439-40 (9th Cir. 1979) (sole shareholder in automobile dealership cannot sue in individual capacity in claims arising under Automobile Franchise Act, antitrust laws or in pendent state claims); *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 846 (9th Cir. 1976) (majority shareholder barred from suing for interference with corporation's contractual relations; following rule "avoids multitudinous litigation and recognizes the corporate entity"); *Smith v. Martin*, 542 F.2d 688, 690 (6th Cir. 1976), *cert. denied*, 431 U.S. 907 (1977). *But see Leverett v. City of Pinellas Park*, 775 F.2d 1536, 1538-39 (11th Cir. 1985) (liberal approach to standing in first amendment area makes shareholder standing bar inapplicable where individuals seek to raise corporation's first amendment claims). None of these decisions provides a detailed justification for applying the rule against shareholder standing to situations where shareholder suits do not threaten to circumvent the limits on diversity jurisdiction or to undermine managerial decisionmaking. *Von Brimer* and *Erlich*, however, suggest that in this context, the prohibition on shareholder action rests primarily on considerations of judicial economy and the importance of avoiding a multiplicity of suits. *See Von Brimer*, 536 F.2d at 846; *Erlich*, 418 F.2d at 228. *See generally* 12B W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§5909-5911 (rev. perm. ed. 1984).

This brief overview points up an important difference between limitations on shareholder standing and the general prudential requirements. Though prudential in the sense that they are judge-made restrictions on the availability of the federal courts, traditional limitations on shareholder standing derive from broader origins than do the general prudential restrictions. When courts bar shareholders from bringing suit in order to prevent corporations from circumventing statutory limits on diversity jurisdiction or to prevent minority shareholders

from interfering with the operation of the corporation, they are animated by concerns about the limits on judicial power and the appropriateness of a particular plaintiff bringing a particular action—issues at the core of what we have been calling the prudential aspect of the standing question. But when courts bar shareholder suits solely to avoid a multiplicity of suits and to conserve judicial resources, in situations where neither the manipulation of diversity jurisdiction nor the maintenance of majority control is at issue, they are animated by qualitatively different concerns. The focus in this latter class of cases is on " '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,' " *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)). In deciding whether to abstain from a controversy in deference to a parallel state court proceeding—a decision resembling the prudential aspect of a standing determination both in its effect and in its attention to prudential considerations—the Supreme Court has held that the conservation of judicial resources can only in "exceptional circumstances" justify the withholding of federal jurisdiction in spite of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Id.; see Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 13-19 (1988).[8] While the courts' housekeeping concerns certainly warrant consideration, we believe that *Colorado River* and *Moses H. Cone* place them on a lower footing than concerns about preventing the courts from trenching on the prerogatives of elected officials. Thus,

[8] *Colorado River* does list federal court actions to restrain the collection of state taxes as one of the few categories of cases in which abstention may be appropriate. 424 U.S. at 316. We discuss the comity and federalism argument for denying standing in Part II. B. below.

in addressing whether injuries to foreign parents are sufficiently direct to confer standing, we attend to which of the several aims of the shareholder standing "rule" would be served by its invocation.[7]

Only a handful of decisions have considered whether foreign parents have standing to contest the constitutionality of unitary taxes assessed on their domestic subsidiaries. In general, they have denied standing; and they have all relied upon a broad formulation of the rule limiting shareholder standing. In *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593, 595-56 (9th Cir.), *cert. denied*, 464 U.S. 1012 (1983), the Ninth Circuit found that the injury suffered by a parent corporation due to the multiple taxation of foreign income was indirect, entirely derivative of injuries to its California subsidiary.[8] *Accord EMI Ltd. v. Bennett*, 788

[7] Our research has revealed only two cryptic references to the relationship between shareholder standing rules and the general prudential limits on standing. *See Shell Petroleum, N.V. v. Graves*, 570 F. Supp. 58, 68 n. 6 (N.D. Cal.) ("The requirement that a shareholder establish injury to rights specifically vested in it individually, distinct from those of the corporation ... might or might not be a particular instance of the more general prudential standing principles quoted above. But in any event, the requirement must be satisfied."), *aff'd*, 709 F.2d 593 (9th Cir.), *cert. denied*, 464 U.S. 1012 (1985); Note, *The Demand and Standing Requirements in Stockholder Derivative Actions*, 44 U. Chi. L. Rev. 168, 168 n.5 (1976) (" 'Standing' in the context of derivative actions is not to be confused with its more traditional meaning as defining when an individual can challenge governmental action.").

[8] *Shell* also affirmed the district court's alternative holding that Shell's claim would not be ripe until its American subsidiaries had exhausted their remedies before California administrative bodies. 709 F.2d at 596-97. The district court held that even if Shell had not run afoul of the prohibition on shareholder standing, its injury would not be sufficiently certain and immediate to be deemed ripe until its subsidiaries had exhausted their state-level challenges. *Shell Petroleum, N.V.*, 570 F. Supp. at 65-66. The district court predicated this strict ripeness requirement on the comity and federalism concerns that gave rise to the Tax Injunction Act and the Supreme Court's continuing recognition of limits on its equity powers even where the Act is inapplicable. *Id.* at 66. We discuss these matters further below.

F.2d 994, 996-99 (9th Cir.), *cert. denied*, 469 U.S. 1073 (1964). Similarly, a New York district court has held, and the Second Circuit has affirmed, that Alcan lacked standing to sue the FTB because Alcan had not demonstrated that it incurred a direct injury or that the FTB owed Alcan some independent duty. *Alcan Aluminium Ltd. v. Franchise Tax Bd.*, 558 F. Supp. 624, 628-29 (S.D.N.Y.), *aff'd mem.*, 742 F.2d 1430 (2d Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984) (hereinafter "*Alcan I*").[9] The district court rejected Alcan's claim that the unconstitutional taxation of an "instrumentality of foreign commerce" in its control constituted a direct injury sufficient to confer standing. *Alcan I*, 558 F. Supp. at 629.

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[9] An earlier district court decision in *Alcan I* stayed federal court proceedings, including resolution of the standing issue, pending resolution of Alcan's challenges before state administrative bodies and courts. *Alcan Aluminium Ltd. v. Franchise Tax Bd.*, 539 F. Supp. 512, 516 (S.D.N.Y. 1982).

Because Alcan lost on standing grounds in *Alcan I*, one might have expected the FTB to pursue a collateral estoppel defense in this action. *See Planned Parenthood Ass'n v. Kempiners*, 700 F.2d 1115, 1188 (7th Cir. 1988). Indeed, the FTB did move to dismiss Alcan's complaint on collateral estoppel grounds in the district court, but its motion was denied. The FTB's cross-motion for summary judgment requested reconsideration of collateral estoppel as an alternative basis for dismissing Alcan's suit, but the district court did not discuss this argument.

On appeal, the FTB virtually ignores this issue. It characterizes *Alcan I* first as "[a]n action similar to the present one," Brief of Appellees at 11 n.5, and later as a case that "alleged grounds for relief . . . substantially identical to those asserted here," *id.* at 29. Appellees' only reference to collateral estoppel appears in a footnote discussing the fate of the collateral estoppel claims in the district court. This is notably less than the presentation of legal authority and facts about the two cases that would be required for us to address the collateral estoppel argument on appeal. *See Bonds v. Coca-Cola Co.*, 806 F.2d 1324 (7th Cir. 1986); *Manbourne Inc. v. Conrad*, 796 F.2d 884, 883, 890 n.6 (7th Cir. 1986).

There may well be some merit to the discussions of compliance costs and the double taxation of income in these decisions insofar as these facts, *in themselves,* were deemed insufficient to constitute direct injuries to the parent companies. The information demands of which Alcan and Imperial complain were presented, as the district court pointed out to Alcancorp and Americas, not to their foreign parents. Mem. op. at 10. Alcan and Imperial may find it in their interest to expend the considerable sums that they say will be required to produce the worldwide figures for the unitary enterprises that California has requested from their subsidiaries. Or they may find it more advantageous to accept the penalties that California will impose on its subsidiaries for failing to produce the figures. In either event, one could view the information demands as affecting Alcan and Imperial by reducing the profitability of their California operations, not of the administrative costs that these operations impose on the worldwide enterprises. By possible analogy if California enacted environmental or worker safety regulations requiring corporate taxpayers to produce costly information obtainable only through their foreign parents, it would be questionable whether foreign parents would have independent standing to challenge those regulations (at least so long as there was no indication that the regulations were not a mere pretext for raising costs of foreign-owned enterprises). Of course, it is entirely possible, though Alcan and Imperial have made no such claim here, that some parent companies' accounting systems attribute some of the costs of complying with unitary tax systems (or with environmental regulations) to foreign affiliates. But the nominal incidence of compliance costs under a company's own accounting system would not, in itself, normally be determinative of

"direct" injury. The compliance cost can be viewed, in principle, as an increase in the overhead of the California operations; under that view, the foreign parents incur harm as shareholders in an enterprise faced with increased costs. *See EMI Ltd.*, 738 F.2d at 997; *Shell Petroleum, N.V.*, 709 F.2d at 595-96; *see also Alcan I*, 558 F. Supp. at 628-29 & n.9.

Somewhat similar considerations may apply to the double taxation claim, although only as that claim is narrowly construed. Alcan and Imperial point out that California's unitary tax scheme is inconsistent with the transactional approach employed by most if not all foreign nations (as well as by the United States government), which allocates profits among affiliated operations by estimating the distribution of profits that would result from arm's length transactions. Alcan and Imperial contend that California's taxation of corporate income, on which foreign affiliates must pay taxes to their host governments under a transactional tax system, directly injures the foreign parents. But it is possible to view these taxes, like compliance costs, simply as added costs for the domestic subsidiary, experienced by the foreign parent as a decline in the after-tax profits of its California operations. *See EMI Ltd.*, 738 F.2d at 996 (parent's "only real connection to the live controversy is in its status as majority shareholder"); *Shell Petroleum, N.V.*, 709 F.2d at 595 ("[unitary] method of taxation ... does not injure [parent] directly or independently of the corporation").

However, the arguments that Alcan and Imperial incur no direct and independent injury from costs plausibly viewed as burdens on their subsidiaries remains persuasive only so long as the relationship between parents and subsidiaries is viewed narrowly, focusing

exclusively on the parents' status as shareholders. It is indisputable that, but for their ownership of stock in corporations that operate in California, Alcan and Imperial would have no complaint about either compliance costs or double taxation. This line of argument, however, ignores a second important feature of the relationship between the foreign parents and their domestic subsidiaries; the subsidiaries are owned as instrumentalities of the foreign commerce of their parents. Foreign companies seeking to sell or purchase products or services in California choose between conducting business through dealings with American subsidiaries or through contracts with unrelated companies. Plaintiffs allege that for many enterprises subject to the unitary tax, the earnings of operations in California, computed under the arm's length transaction approach, are lower in relation to labor cost, capital assets and sales than are the similarly computed earnings of related operations in countries other than the United States. These companies will show a higher taxable income in California under the unitary tax scheme than they would if they engaged in precisely the same foreign commerce through arm's length contracts with unaffiliated companies. From the perspective of the foreign parent, therefore, the unitary tax diminishes the attractiveness of owning American subsidiaries in comparison with entering into contracts with independent companies as a means of engaging in foreign commerce. The potential for the unitary tax to penalize foreign ownership of American assets distinguishes the unitary tax from environmental or safety regulation that might cause comparable increases in the cost of doing business in California, but would presumably affect foreign and domestically owned operations fairly equally. It is the incidence of the unitary tax, its potential to

disfavor a particular mode of foreign participation in the American economy, rather than the magnitude of the costs it imposes that provides the strongest argument for standing.[10]

Viewed in these terms, Alcan's and Imperial's injuries are direct and independent of the injury to their subsidiaries and standing should follow. To the extent that California's franchise tax burdens foreign companies' decisions to conduct business through subsidiaries operating in California, it threatens to offend this country's trading partners, many of whom must deal with conflicting internal views on the proper role of American investment in their economies, and to elicit retaliatory measures. Concern about precisely this type of foreign response to states' taxation of foreign interests has led the Supreme Court to find stricter limits on state taxes in the foreign commerce clause than in the interstate commerce clause. *Japan Line*, 441 U.S. at 444-45. The record in this case contains numerous indications that foreign governments view California's

[10] The tax burden on companies subject to California's franchise tax will depend, of course, on the tax rate as well as the proportion of worldwide earnings attributed to California's operations. A state that applies a high tax rate to earnings computed according to the arm's length transaction method can depress after-tax earnings available to a foreign parent more than a state that applies a lower rate to the unitary revenues. *See Container Corp.*, 468 U.S. at 195. However, a unitary tax system has the potential to shift a higher proportion of the corporate tax burden onto companies that are affiliated with foreign operations. It is this possibility that implicates the concerns about foreign retaliation that have guided the court's interpretation of the foreign commerce clause. *See Japan Line*, 441 U.S. at 456; *see also Container Corp.*, 468 U.S. at 139 n.26, 195 n.32 (noting possibility that application of unitary tax to domestic subsidiaries of foreign companies may offend trading partners); *cf. Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1027, 1034-35 (1967). Evaluation of the constitutional significance of this threat in the particular circumstances presented by California's unitary tax must await the district court's assessment of the merits of this appeal. We decide only that the potential for constitutionally significant offense is sufficient to create standing.

and other states' sharp departures from the international norm of taxing corporate income based on transactional allocations of income as a source of serious injury to multinationals located within their borders and a threat to commercial relations with the United States.[11] To be sure, burdening the use of California subsidiaries as an instrumentality of foreign commerce does not necessarily harm Alcan and Imperial exclusively. Alcancorp and Americas may incur parallel injuries by virtue of their participation in the same foreign commerce. But the choices about the manner in which international trade is to be conducted are primarily the parents' choices. To dismiss the injury to the foreign parents caused by the distortion of these choices as indirect and derivative is to expand the shareholder standing rule in an area where its underpinnings are weakest. While we might save some federal courts' resources by confining foreign parents to their subsidiaries' remedies in state tribunals, to achieve these marginal savings we would have to overlook the real sense in which California's franchise tax directly and independently injures Alcan and Imperial. It is important that these injuries, which the FTB would have us label indirect under an expansive view of the shareholder standing bar, have fueled a simmering trade

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[11] *See, e.g.*, United Kingdom Finance Act of 1985, New Clause 27 (authorizing Treasury of United Kingdom, subject to parliamentary review, to withdraw United Kingdom tax credit from United States companies with substantial operations in unitary tax states), *reprinted in* Appendix to the Brief of Plaintiff-Appellant Imperial Chemical Indus. PLC, Item 8; Brief Amicus Curiae Filed on Behalf of the Member States of the European Communities and the Governments of Australia, Japan and Switzerland, No. 87-2295 at 2 (Aug. 27, 1987) ("This case involves issues of vital importance to the fifteen countries and to their future economic and commercial relations with the U.S.").

controversy which has raised concerns about foreign retaliation and the country's ability to speak with one voice on matters of foreign commerce—concerns that are central to the purposes of the foreign commerce clause.[12]

B.

The FTB also asserts that Alcan and Imperial are barred from federal court by the principles of comity that have traditionally detered federal courts from interfering with state revenues. These principles were partially codified in the Tax Injunction Act, which prohibits district courts from enjoining, suspending or restraining state taxes "where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1841 (1982). But that Act is inapplicable here. The Act has been interpreted broadly, in light of Congress' intent "to prevent federal-court interference with the assessment and collection of state taxes," to bar declaratory as well as injunctive relief for plaintiffs with adequate state remedies. *California v. Grace Brethren Church*, 457 U.S. 398, 411 (1982). The Court has also adopted a lenient constuction of the "plain, speedy and efficient" proviso. *Id.* at 412-13; *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512-14 (1981). However, the Act has not been construed so broadly as to bar a nontaxpayer (like the parent companies involved here) who lacks a remedy in state court from bringing suit in federal court on the ground that an affiliated taxpayer possesses adequate state court remedies. The FTB concedes that California's administrative and judicial remedies are available only to the taxpaying subsidiaries and not to their parents. Thus, the Tax Injunction Act

[12] Insofar as the Ninth Circuit's decisions in *Shell Petroleum, N.V.* and *EMI Ltd.*, may conflict with our holding, we are not persuaded to follow them.

does not, by its terms, undermine Alcan's and Imperial's entitlement " 'to a judicial remedy in which they can participate as a party.' " *Alcan II,* 724 F.2d at 1297 (quoting *Capitol Indus.-EMI, Inc. v. Bennett,* 681 F.2d 1107, 1119 (9th Cir.), *cert. denied,* 455 U.S. 943 (1982)).

The inapplicability of the Tax Injunction Act, however, does not settle the issue. The Act left intact federal courts' "discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 298 (1943). In some circumstances, this discretion, guided by considerations of comity and federalism, may be exercised to bar suits against state tax assessments to which the Tax Injunction Act is inapplicable. *See Fair Assessment in Real Estate Ass'n Inc. v. McNary,* 454 U.S. 100, 110-13 (1981) (suit for money damages under 42 U.S.C. section 1983); *Great Lakes,* 319 U.S. at 298-99 (suit for declaratory judgment);[13] *see also Colorado River,* 424 U.S. at 816 (aversion to interference with state revenues represents one of few, limited grounds for federal abstention); *cf. Burford v. Sun Oil Co.,* 319 U.S. 315, 332-34 (1943) (abstention from request to enjoin order of regulatory commission where suit "involves basic problems of [state] policy"). In *Alcan II,* we held that "the principle of comity militates in favor of a stringent standard of justiciability in cases that threaten to interfere with state taxes." 724 F.2d at 1298. Justiciability in that case turned on a ripeness question:

[13] *Great Lakes* declined to decide whether the Tax Injunction Act applied to suits for declaratory judgment, reasoning that considerations of comity justified the refusal to hear such a suit even if the statute did not literally apply. Subsequently, *California v. Grace Brethren Church* revisited the issue and expressly held that the Act did not distinguish between suits for declaratory and injunctive relief. 457 U.S. at 408-11.

whether the costs to a foreign parent of producing the information required for a unitary tax audit, before the unitary tax in question had even been held applicable, were "sufficient to overcome the prudential considerations of comity." *Id.* at 1299. While we held that the controversy was not yet ripe, we declined to address whether the same prudential concerns would deprive the parent corporation of standing in the event that the audit produced a determination that the unitary tax applied. *Id.*

We hold that comity and federalism, weighty as these concerns are where federal courts pass on the constitutionality of state tax legislation, cannot justify withholding federal jurisdiction from a party with no cause of action in state court to redress its own direct and independent injury. This is especially true where important, and apparently pressing, considerations of international comity as well as comity within our own federal system are at stake. Neither *Great Lakes* nor *McNary,* in which the Supreme Court invoked equitable abstention to avoid federal court interference with state revenue sources, turned aside parties who could not themselves sue in state court.[14] It is also significant that California presumably possesses a ready remedy for unwanted federal intrusion. To eliminate federal court jurisdiction over disputes of this nature, the state need only provide foreign parent companies with a "plain, speedy and efficient" remedy of their own in state court.

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[14] In *Alcan Aluminium Ltd. v. Franchise Tax Bd.*, 539 F. Supp. 512, 515-16 (S.D.N.Y. 1982), the district court did invoke equitable abstention to stay Alcan's federal suit, despite Alcan's lack of standing in state court. The stay remained in force for nine months before it was superseded by an order dismissing the suit on standing grounds. *See Alcan I,* 558 F. Supp. 624.

See Capitol Indust.-EMI, 681 F.2d at 1119 n.32; *Alcan Aluminium,* 539 F. Supp. at 516 n.9. With such effective means of self-help for the state so near at hand, we cannot conclude that comity requires us to deny plaintiffs the opportunity to appear as named parties to litigate their constitutional claims.

IV.

We find that Alcan and Imperial, owners of controlling interests in American subsidiaries that function as instrumentalities of their foreign commerce, have alleged injuries resulting from California's franchise tax that are sufficiently direct and independent of the injuries to their subsidiaries to confer standing. We further find that the foreign parent companies, which have no standing in state court, cannot be barred from federal court on the strength of the principles of comity and federalism that have sometimes justified abstention from disputes about state taxes pending before state tribunals. We therefore reverse and remand for further proceedings.

REVERSED AND REMANDED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT

(Entered September 20, 1988)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-2111

LERCY D. BENITEZ ALLENDE, *et al.*,
Plaintiffs, Appellees,

v.

ALCAN ALUMINIO DO BRASIl,
S.A., *et al.*,
Defendants, Appellants.

No. 88-1089

LERCY D. BENITEZ ALLENDE, *et al.*,
Plaintiffs, Appellants,

v.

ALCAN ALUMINIO DO BRASIL,
S.A., *et al.*,
Defendants, Appellees.

JUDGMENT

These causes came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court against Alcan/Brasil and Diaz are affirmed.

The judgments insofar as they disallow the claims of Cruz Diaz and Benitez Allende against Manuel Diaz are vacated and the causes are remanded to the district court for further proceedings consistent with the opinions filed this day.

Costs to be paid by Alcan Aluminio Do Brasil, S.A.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

ORDER OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Entered October 24, 1988)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-2111

LERCY D. BENITEZ ALLENDE, *et al.*,
Plaintiffs, Appellees,

v.

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Defendants, Appellants.

No. 88-1089

LERCY D. BENITEZ ALLENDE, *et al.*,
Plaintiffs, Appellants,

v.

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Defendants, Appellees.

BEFORE

CAMPBELL, *Chief Judge,*
COFFIN, BOWNES, BREYER, TORRUELLA and SELYA, *Circuit Judges,*
and CAFFREY,* *Senior District Judge.*

ORDER OF COURT

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that both the petition for rehearing and the suggestion for rehearing en banc be and the same hereby are denied.

By the Court,

FRANCIS P. SCIGLIANO
Clerk

ORDER OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT RE MANDATE

(Dated November 1, 1988)

CLERK'S OFFICE

U. S. COURT OF APPEALS FOR
THE FIRST CIRCUIT

No. 87-2111 & 88-1089 Lercy D. Benitez Allende, *et al.* v. Alcan Aluminio do Brasil, (S.A., *et al.*

Mandate herein issued today.

FRANCIS P. SCIGLIANO,
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

(Entered November 23, 1988)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-2111

LERCY D. BENITEZ ALLENDE, *et al.*,
Plaintiffs, Appellees,

v.

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Defendants, Appellants.

No. 88-1089

LERCY D. BENITEZ ALLENDE, *et al.*,
Plaintiffs, Appellants,

v.

ALCAN ALUMINO DO BRASIL, S.A., *et al.*,
Defendants, Appellees.

ORDER OF COURT

Treating the motion of defendants, Alcan Alumino Do Brasil, S. A. for stay of mandate or a motion to recall the mandates of this Court which issued on November 1, 1988 in each of the above cases,

It is ordered that said motion be, and the same, hereby is denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

NOTICE OF THE UNITED STATES SUPREME COURT DENYING STAY PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.
Clerk of the Court

Area Code 202
479-3011

December 5, 1988

Mr. Lawrence A. Salibra
1301 East Ninth Street
29th Floor
Cleveland, OH 44114

Re: Alcan Alumino do Brasil, S.A. and
Manuel Diaz,
v. Lercy D. Benitez Allende, et al.
Application No. A-444

Dear Mr. Salibra:

The application for a stay pending the filing and disposition of a petition for a writ of certiorari in the above-entitled case has been presented to Justice Brennan, who on December 5, 1988 endorsed thereon the following:

"Denied
Wm. J. Brennan, Jr.
12/4/88"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk
/s/ EDWARD L. TURNER, JR.
Edward L. Turner, Jr.
Assistant Clerk

NOTE—FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

NOTIFICATION LIST

Mr. Lawrence A. Salibra
1301 East Ninth Street
29th Floor
Cleveland, OH 44114

Mr. Frederico Lopez
P.O. Box 4266
Hato Rey, PR 00919

Mr. Victor Clavell
Bloque 16 #22
Aguas Brunas Avenue
Bayamon, PR 00619

PETITION FOR REHEARING *EN BANC* FILED IN THE COURT OF APPEALS FOR THE FIRST CIRCUIT

Case No. 87-2111

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NOS. 84-1914; 84-2338; 85-0256

LERCY D. BENITEZ ALLENDE, *et al.*,
CARMEN CRUZ DIAZ, *et al.*,
RAMONITA GARCIA ANDINO, *et al.*,
Plaintiffs-Appellees,

v.

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Defendants-Appellants.

PETITION FOR REHEARING *EN BANC*

LAWRENCE A. SALIBRA, II
ALCAN ALUMINUM CORPORATION
Galleria at Erieview
29th Floor
1301 East Ninth Street
Cleveland, OH 44114
216/523-6918

EUGENIO C. ROMERO, ESQ.
GOLDMAN & ANTONETTI
Insurance Center
701 Ponce de Leon Avenue
Santurce, Puerto Rico 00908

QUESTIONS PRESENTED FOR *EN BANC* REVIEW

I. MAY NON-RESPONSES BY PLAINTIFFS' EXPERTS DURING DISCOVERY BE CORRECTED FOR THE FIRST TIME AT TRIAL, THEREBY ALLOWING PLAINTIFFS TO AVOID THEIR DISCOVERY OBLIGATIONS, AS WELL AS SUMMARY JUDGMENT?

II. MAY A VERDICT BE BASED ON SPECULATION IF THE FACTS PRESENTED TO THE JURY BY PLAINTIFFS DO NOT LOGICALLY SUPPORT THE JURY'S VERDICT?

III. COULD THE TRIAL COURT HAVE APPLIED PUERTO RICAN LAW, DESPITE THE OVERWHELMING VIEW THAT *JAPAN LINE* SHOULD BE CONSTRUED AS PROHIBITING SUCH BURDENS ON FOREIGN COMMERCE?

IV. COULD THIS COURT IGNORE THE JURY INSTRUCTIONS CONCERNING DEFENDANT DIAZ, EVEN THOUGH TO DO SO: 1) WOULD BE CONTRARY TO A LAYMAN'S COMMON SENSE UNDERSTANDING OF THE AMERICAN LANGUAGE; 2) WOULD BE LOGICALLY INCONSISTENT, THEREBY DENYING DIAZ HIS RIGHT TO PROCEDURAL DUE PROCESS?

TABLE OF CONTENTS

INTRODUCTION 1

I. MAY NON-RESPONSES BY PLAINTIFFS' EXPERTS DURING DISCOVERY BE CORRECTED FOR THE FIRST TIME AT TRIAL, THEREBY ALLOWING PLAINTIFFS TO AVOID THEIR DISCOVERY OBLIGATIONS, AS WELL AS SUMMARY JUDGMENT? 3

A. This Court Improperly Characterized Dr. Soderstrom's Testimony As "Somewhat Vague and Conclusory." 3

B. This Court's Conclusion That Defendants Were At Fault For Plaintiffs' Expert Not Having An Opinion By Failing To Timely Deliver Documents, And Were Thus Not Entitled To Summary Judgment, Is Inaccurate And Should Be Attributed To The Dilatory Tactics Of The Plaintiffs And The Delay Of The Trial Court 5

C. This Court's Holding That The Proper Method Of Dealing With The Non-Responses Of Plaintiffs' Expert Was To Force The Parties To Trial Would Fatally Undercut The Objectives Of Discovery 6

II. MAY A VERDICT BE BASED ON SPECULATION, IF THE FACTS PRESENTED TO THE JURY BY PLAINTIFFS DO NOT LOGICALLY SUPPORT THE JURY'S VERDICT? 8

III. COULD THE TRIAL COURT HAVE APPLIED PUERTO RICAN LAW, DESPITE THE OVERWHELMING VIEW THAT *JAPAN LINE* SHOULD BE CONSTRUED AS PROHIBITING SUCH BURDENS ON FOREIGN COMMERCE? 11

IV. COULD THIS COURT IGNORE THE JURY INSTRUCTIONS CONCERNING DEFENDANT DIAZ, EVEN THOUGH TO DO SO: 1) WOULD BE CONTRARY TO A LAYMEN'S COMMON SENSE UNDERSTANDING OF THE AMERICAN LANGUAGE; AND 2) WOULD BE LOGICALLY INCONSISTENT, THEREBY DENYING DIAZ HIS RIGHT TO PROCEDURAL DUE PROCESS 12

CONCLUSION 15

TABLE OF AUTHORITIES

Celotex v. Catnett, Admin., 477 U.S. 317 (1986)..... 3

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 11

Marcus v. St. Paul Fire & Marine Ins. Co., 651 F.2d 379 (5th Cir. 1981)..... 7

[1] INTRODUCTION

This appeal arises out of a set of cases alleging that plaintiffs were injured by pressure cookers defectively manufactured by Appellant Alcan Aluminio do Brasil, S.A., a foreign corporation located in Brazil. Plaintiffs asserted that the pressure locking system on the Alcan pressure cookers was defectively designed to permit the cookers to be forced opened even though sufficient pressure might still be in the cookers to cause food in the cookers to spray out when the cooker was opened.

In support of their case, Plaintiffs retained Dr. Kenneth G. Soderstrom. Unfortunately, when Dr. Soderstrom was deposed by Alcan just before the close of discovery (for the second time), Dr. Soderstrom had no opinion as to the cause of the Plaintiffs' injuries, because he had neither examined the pressure cookers nor investigated how the plaintiffs themselves alleged the cookers exploded.

Alcan first unsuccessfully moved for summary judgment on the grounds Soderstrom's non-response failed to provide plaintiffs sufficient evidence as to cause or proximate cause to avoid summary judgment. Alcan promptly requested prior to trial that Soderstrom's testimony either be excluded on the grounds he had rendered no opinion, or that Alcan be granted a continuance to depose him further. These requests were also denied.

[2] Dr. Soderstrom's testimony at trial was that plaintiffs could have been injured under three different scenarios. *None* of these scenarios, however, was supported by the evidence presented by plaintiffs.

At the close of trial, the Court issued jury instructions which required the jury to find Alcan liable if three conditions had been proven by plaintiffs, one of

which was that Alcan was the manufacturer of the pressure cookers. The Court then instructed the jury that Defendant Diaz could only be found liable based on these same jury instructions, i.e. only if Diaz was a manufacturer. Plaintiffs did not object to these instructions.

Defendants appealed to this Court, protesting these rulings, as well as the court's finding of jurisdiction over Defendants, and the application of Puerto Rican law to the foreign Defendants. In response, this Court ruled that:

1. Soderstrom's non-response during discovery could be resolved at trial by allowing him to testify for the first time about his opinion, thereby precluding summary judgment for Alcan;

2. Even if the injuries could not have occurred as both plaintiffs and their expert testified, the jury could determine on its own another scenario, apart from that provided by plaintiffs, by which the injuries could have occurred;

3. Puerto Rican law could be applied to the foreign Defendants in this case, despite the Foreign Commerce Clause to the U.S. Constitution;

4. The jury could have found Diaz liable, regardless of the jury instruction that Diaz could be found liable only if he was a manufacturer of the pressure cookers.

[3] ARGUMENT

I. MAY NON-RESPONSES BY PLAINTIFFS' EXPERTS DURING DISCOVERY BE CORRECTED FOR THE FIRST TIME AT TRIAL, THEREBY ALLOWING PLAINTIFFS TO AVOID THEIR DISCOVERY OBLIGATIONS, AS WELL AS SUMMARY JUDGMENT?

Defendants first appealed to this Court on the ground that it was entitled to summary judgment on the basis that the Plaintiffs' expert had no opinion at the close of discovery concerning two essential elements of its proof: the existence of a defect, and a causal connection between the alleged defect and the plaintiffs' injuries. Defendants argued that this case was controlled by the Supreme Court's recent decision in *Celotex Corp. v. Catnett, Admin.*, 477 U.S. 317 (1986), and required an entry of summary judgment. This Court improperly found against Appellant based on a misinterpretation of the expert's testimony, a mistaken representation of defense counsel's conduct and an erroneous application of controlling precedent.

A. This Court Improperly Characterized Dr. Soderstrom's Testimony as "Somewhat Vague and Conclusory."

At his deposition, Dr. Soderstrom, plaintiffs' sole expert, was specifically asked if he had reached a professional opinion as to the existence of a design or manufacturing defect and to explain the causal relationship between the alleged defect and plaintiffs injuries. Dr. Soderstrom's answer was not at all "vague" as this Court states (*Opinion*, p. 13). On the contrary, it was quite explicit. He stated that he had *no* opinion. He even offered two explanations for not having any

opinion. He stated that he had not examined the cookers since he was not told [4] by the plaintiffs' counsel that such examination should have been conducted before his deposition. Second, he stated that he had no idea how the plaintiffs' claimed the injuries occurred; therefore, he could not render an opinion as to causation. (Ex. X, Soderstrom Depo. pp. 10-12.)

During his deposition, Dr. Soderstrom was given three hypothetical scenarios involving the cooker explosions, which were based upon the testimony of his own clients as to how the injuries occurred. In two of the three hypotheticals, Dr. Soderstrom testified that the injuries could not have occurred as described, thus explicitly contradicting his own clients' versions of the occurrences. In the third, Soderstrom stated that the physical evidence did not support the conclusion as to how the alleged explosion occurred, but he could give no further opinion until he examined the cooker in detail (*id.*, at 11-58.)

Thus, not only were Dr. Soderstrom's opinions not "vague" as this Court attempts to characterize them, they explicitly contradicted the plaintiffs' own versions of how they were injured by the cooker. Therefore, this Court should reconsider its opinion that the plaintiffs' expert's testimony was "somewhat vague and conclusory."

[5] *B. This Court's Conclusion That Defendants Were At Fault For Plaintiffs' Expert Not Having An Opinion By Failing To Timely Deliver Documents, And Were Thus Not Entitled To Summary Judgment, Is Inaccurate And Should Be Attributed To The Dilatory Tactics Of The Plaintiffs And The Delay Of The Trial Court.*

The plaintiffs made enormous discovery demands as contrasted with the comparatively meager discovery conducted by the defendants. Furthermore, throughout those discovery requests, the defendants only sought minor limitations on plaintiffs' discovery efforts. One such limitation was the objection defendants had to producing a study conducted by Arthur D. Little ("Little"). Little was engaged exclusively for the purpose of assisting counsel in the preparation for litigation (see attached letter of engagement). Little was not being called to testify and, in fact, Little *did not* even evaluate the cookers of these plaintiffs.

The plaintiffs failed to receive the study as soon as apparently this Court now assumes they needed it for two obvious reasons. First, plaintiffs did not ask for the study until March 25, 1987, almost four years after the lawsuits were filed and just a few months before trial. In fact, it would have done them little good to have asked much earlier, because they only engaged their expert in mid-May of 1987, about six (6) weeks before the first scheduled trial date[1] Alcan objected to the production of the A. D. Little documents on the ground that it was not subject to discovery as attorney work product pursuant to FRCP 26(b)(4).[1] [6] Plaintiffs then let another month or so elapse until they filed their motion to compel—almost in the middle of June. In accordance with the original

[1] In fact, Alcan prevailed on this issue in a pressure cooker case in the Southern District Court of Florida.

trial schedule, this was just weeks before trial. The issue was fully briefed and when the trial court rendered an adverse ruling on September 28, 1987—days before trial was to commence—Alcan promptly surrendered the document. Under these facts, for this Court to suggest defendants were responsible for plaintiffs' expert's total lack of an opinion comes as a surprise.

The essence of this Courts ruling is to: 1) assign responsibility for the plaintiffs' delay to defendants, and 2) to assert that defendants must waive their right to argue the appropriate application of the Federal Rules in order to protect their rights under Rule 56.

In consequence, this Court must instead find that plaintiffs' expert testimony was improvidently allowed and that summary judgment for defendants was compelling under such circumstances.

C. This Court's Holding That The Proper Method Of Dealing With The Non-Responses of Plaintiffs' Expert Was To Force The Parties To Trial Would Fatally Undercut The Objectives Of Discovery.

Defendants predicated this appeal on the basis that the recent holding of the United States Supreme Court in *Celotex, supra,* required a grant of summary judgment for it, since Plaintiffs' expert could render no opinion as to causation or proximate causation. Even the trial court recognized that *Celotex* was the controlling precedent on this issue.

[7] This Court's rationale in denying Appellant's appeal was incorrect for three reasons. First, the proposition that vague discovery responses can and should be corrected by forcing the parties to trial simply contradicts the commonly understood objective of discovery, which is to avoid "trial by ambush". This

principle has been established by the explicit language of the Federal Rules and the long standing precedent of this Court and other courts. That precedent was cited in our briefs presently before this Court and need not be repeated here. Simply stated, to force parties to trial when one has not been permitted adequate discovery is to create the very ambush the discovery rules where designed to prevent. Indeed, this Court's opinion would encourage plaintiffs' experts to render no opinion during discovery, so as to give plaintiffs the "element of surprise" during trial.

The second reason why this Court's reasoning deserves further consideration is that the opinion reflects no cited support for the proposition stated therein. This Court relies on two authorities for the proposition that discovery can be completed by forcing the parties to trial. The first authority is a Fifth Circuit case, *Marcus v. St. Paul Fire & Marine Ins. Co.*, 651 F.2d 379 (5th Cir. 1981), which does not address the interrelationship between discovery and the entitlement to summary judgment. Rather, *Marcus* deals with the application of the doctrine of collateral estoppel as between an existing state action and a corresponding federal action.

[8] The second cited authority is a reference to 10A, C. Wright, A. Miller & M. Kane, *Federal Practice And Procedure,* Section 2728. nn. 11 & 12 (1983 & Supp. 1987). That reference, rather than stating that a trial court has discretion to force the parties to trial as this Court represents, in fact states that the Court has the discretion to let the action continue. The clear import is to permit continued discovery or exclude the non-responsive expert. Appellant requested these very remedies from the trial court but was denied (TR 47).

The third reason for reconsidering this opinion is that all the citations referred to in the Wright and Miller reference precede *Celotex*. Given the Supreme Court's holding in that case, it is doubtful that the cases relied by this Court are good law.

Thus, because the principle enunciated by this Court in denying Alcan's appeal would thwart the objectives of discovery, is contrary to overwhelming precedent including the controlling precedent of the United States Supreme Court, and is not supported by the authority it cites, this Court's decision is clearly erroneous and should be reconsidered.

II. MAY A VERDICT BE BASED ON SPECULATION, IF THE FACTS PRESENTED TO THE JURY BY PLAINTIFFS DO NOT LOGICALLY SUPPORT THE JURY'S VERDICT?

Appellants urged this Court to reverse the jury's verdict on the ground that the verdict had to necessarily be based on speculation. This conclusion was evidenced by the fact that even plaintiffs' own expert was speculating, but more persuasively [9] because the jury found substantial contributory negligence that could only be accounted for by speculation since neither party put in evidence of contributory negligence.

In affirming the jury verdict, this Court cites authority for the proposition that the jury has the prerogative for resolving contradictions. We agree. The jury verdict, however, cannot be sustained when, rather than resolving contradictions inherent in the jury's findings, the Court engages in further speculation and contradiction.

This Court, in ratifying the jury verdict, attempts to demonstrate the jury could have understood the information presented and resolved the conflicts to reach a logical result. However, the Court suggests (Opinion, p. 12) that the jury could ignore the plaintiffs' own testimony, and decide a different set of facts could exist on which a jury verdict could be based, even if these facts were not actually before the jury. Thus, if the Court suggests that any illogic in the plaintiffs' case may be explained away by the jury, it is allowing pure speculation by the jury simply so the plaintiffs may succeed.

What the Court has, in fact, demonstrated is that the jury reached a result which is not logically consistent.

This Court explains the jury's logic as follows:

> Also since it found the plaintiffs who used the cookers "contributorily negligent" it may have thought that they had not put the lids on as tightly as they said they had.

(Opinion, p. 4).

[10] When the jury "reasoned" to this conclusion as this Court states (and we agree that is what they did), they in actuality had to be speculating on a proximate cause of the accident beyond any evidence in this trial. The gravamen of the plaintiffs' claim is the absence of a safety interlock that would prevent a consumer from opening the cooker under pressure. If the plaintiffs had not tightly closed the cookers, the safety interlock would not have been engaged in the first instance, thus its absence did not cause the injury. To assert it would under these facts is equivalent to asserting that a defective lock caused the door to open, when the door was not locked in the first place!

There is a scenario under these facts that would permit a finding of contributory negligence and proximate cause. If the plaintiffs had urged that there be a lock designed to engage regardless of the degree of closure, the reasoning of the jury as reconstructed by this Court would be perfectly plausible. The problem is that plaintiffs put on no such evidence, cited no such standard nor did they argue that such a comprehensive interlock was even capable of being designed.

Since this Court's characterization of how the jury incorporated contributory negligence into its verdict would be logically inconsistent unless the jury was speculating on a safety device whose nature was wholly outside of the realm of the evidence at trial, this Court's conclusion should clearly be reconsidered.

[11] III. COULD THE TRIAL COURT HAVE APPLIED PUERTO RICAN LAW, DESPITE THE OVERWHELMING VIEW THAT *JAPAN LINE* SHOULD BE CONSTRUED AS PROHIBITING SUCH BURDENS ON FOREIGN COMMERCE?

This Court held that *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), was distinguishable from this case because it involved a "property tax" on "instrumentalities of foreign commerce". The very same logic was adopted by those states defending against constitutional challenges to their imposition of income taxes on multinationals using the worldwide combined method of apportionment ("unitary tax").

The Appellant Alcan in this case is, in fact, directly involved in that challenge. Its parent's action, presently pending in the Seventh Circuit, is predicated on the proposition that California's unitary taxation imposes

liability for income tax on commercial activities, to wit: the design, manufacture, sale and delivery of goods, which take place wholly outside of the United States. Stated another way, it the position of the appellant's parent, and the Amici[2] who support it, that the imposition of state liability for tax on the same activities which are the subject of this lawsuit violates the Foreign Commerce Clause under the doctrine embodied in *Japan Line.*

If it is unconstitutional to impose liability for income tax on Appellant, we see no reason why a state would have any more authority to impose liability for product defects on the very [12] same activities which are conducted by a foreign national wholly within the confines of its country. It would seem that the only distinction that could possibly be drawn, for the purpose of sustaining the Court's position, would be to point to some language in the Constitution or its history, and we believe there is none, that says that the prohibitions of the Foreign Commerce Clause apply only to tax issues.

On the contrary, we believe the explicit language of the Foreign Commerce Clause and the overwhelming precedent of its sister provision, the Interstate Commerce Clause, make it abundantly clear that these prohibitions extend to any form of state regulation that results in a prohibited burden.

This Court also notes that numerous states have adopted laws which would apply their law in cases such as these. The submitted answer to that proposition is that many states adopted unitary taxation, but that, in and of itself, is not a basis for finding such action constitutional.

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[2] Amicus briefs have been filed on Alcan's behalf by a number of countries including, Canada, Great Britain, Japan, Australia, Switzerland and member States of the European Communities.

On the foregoing bases, we believe that the reasoning of this Court that Alcan's proposition is "farfetched" should be reconsidered.

IV. COULD THIS COURT IGNORE THE JURY INSTRUCTIONS CONCERNING DEFENDANT DIAZ, EVEN THOUGH TO DO SO: (1) WOULD BE CONTRARY TO A LAYMAN'S COMMON SENSE UNDERSTANDING OF THE AMERICAN LANGUAGE: AND (2) WOULD BE LOGICALLY INCONSISTENT, THEREBY DENYING DIAZ HIS RIGHT TO PROCEDURAL DUE PROCESS?

The Court instructed the jury that it must decide Manuel Diaz's case on "the same instruction" it gave regarding Alcan. The jury instruction of the trial court was clear and [13] unequivocal with respect to Alcan. It instructed the jury that it must find three elements in order to find Alcan liable, and one of those was that it must find Alcan was the manufacturer. Alcan believes that language is subject to one and only one common sense interpretation, to wit: that the jury had to apply the same tests to Diaz that had been applied to Alcan in order to establish liability, including the instruction that Diaz must be found to have manufactured the pressure cookers.

At oral argument, one member of this Court sought to characterize the instruction, or at least plaintiffs' failure to object to this instruction, as a "harmless error." Appellants argued, apparently successfully, at oral argument that plaintiffs waived their objection to this jury instruction by failing to object before the jury deliberation. Thus, the instruction, even if in "error", was the law of this case. Now, the written Opinion implies that the Court may be attempting to reconstruct

the jury instruction in order to create a more plausible basis for holding Diaz liable. Appellants submit that this reconstruction merits further attention *en banc*.

This Court's Opinion begins with the proposition that the trial court instructed the jury that it "could find Diaz strictly liable if it found that Alcan/Brasil manufactured the cooker." Opinion, p. 19. That characterization is simply wrong. The jury instruction by the trial court actually stated:

> In order to find Mr. Manuel Diaz liable under the theory of strict liability, you must decide his case based on the same instruction that I have given you regarding the alternate theory of recovery of strict [14] liability in relation to Alcan Aluminio do Brasil, S.A.

(TR 509.) As a result, Diaz could only be found liable if he, in addition to Alcan, was found by the jury to be a "manufacturer", even though no evidence was submitted on which to base such a finding.

The Opinion then appears, wrongly, to characterize the instruction with respect to Diaz in two ways. On page 20 of the Opinion, this Court states that the trial court charged the jury that Diaz was to be found "automatically" liable if it found Alcan liable. However, the Court stated, at page 19 of the Opinion, that the instruction provided that the jury "could" find Diaz liable if it found Alcan liable. It is the position of Appellants that these two characterizations seem logically contradictory.

If the charge to the jury by the trial court said the jury "could" find Diaz liable, then what is the legal standard for liability? Under this characterization of the trial court's charge, once the jury found Alcan liable, they could find Diaz liable for whatever reason they might infer.

The alternative characterization was that Diaz is automatically liable as a matter of law if Alcan is liable. If this is true, then why charge the jury with respect to Diaz, since it would have no factual determinations to make with respect to Diaz? Moreover, if the judge intended to instruct that Diaz would be automatically liable, he could have said exactly that. Pertinent here, plaintiffs requested (Plaintiffs' [15] Requested Jury Instructions, p. 16) the very charge under the stream of commerce authority upon which this Court relies. That charge explicitly described "sellers". The trial court did not adopt that charge, giving further evidence that this Court's recharacterization is incorrect. It was at this point that the trial court failed to adopt the plaintiff's requested stream of commerce instruction that plaintiffs, not defendants, should have objected. Certainly, defendants saw no reason to object to the trial court's rejection of said instruction.

For the foregoing reasons, appellants submit that this Court's reconstruction of the jury charge mischaracterizes the import of the instruction, denies Diaz his right to procedural due process and, therefore, should be reconsidered.

CONCLUSION

For the above-stated reasons, Appellants Alcan and Diaz respectfully request that this Court re-consider its Opinion *en banc*, and instead find for Appellants on these issues.

Respectfully submitted,

/s/ LAWRENCE A. SALIBRA, II
ALCAN ALUMINUM CORP.
1301 East Ninth St., 29th Fl.
Cleveland, OH 44114
(216) 523-6918
Counsel for Appellants

Of Counsel:
EUGENIO C. ROMERO
GOLDMAN & ANTONETTI
701 Ponce de Leon Ave.
Santurce, Puerto Rico 00908
809/721-2424

[16] CERTIFICATE OF SERVICE

I hereby certify that duplicate copies of the foregoing Petition for Rehearing En Banc were served by regular U.S. mail, postage prepaid, on Federico Lora Lopez, Esq., Counsel for Appellees, P. O. Box 4266, Hato Rey, Puerto Rico 00919; and to Victor Sotomayor Clavell, Esq., Bloque 16 #22, Aguas Brunas Avenue, Santa Rosa Development, Bayamon, Puerto Rico 00619, this 3rd day of October, 1988.

LAWRENCE A. SALIBRA, II
Lawrence A. Salibra, II
Counsel for Appellants

LETTER TO LARRY SALIBRA FROM ARTHUR D. LITTLE, INC.

ACORN PARK
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ARTHUR D. LITTLE, INC.

April 2, 1985

CONFIDENTIAL TO COUNSEL

Larry Salibra, Esquire
P.O. Box 6977
Cleveland, OH 44101

Dear Mr. Salibra: *1-3038R*

We are pleased to submit this revised proposal to provide you with technical assistance in evaluating the alleged failures of aluminum pressure cookers manufactured by Alcan Aluminio do Brasil S.A. (Alcan Brasil). We understand that our work for you will be on behalf of Alcan Brasil, but our invoices are to be submitted to your attention and will be payable by Alcan Aluminum Corporation. This proposal cancels and supersedes our proposal 1-3038 dated March 20, 1985.

BACKGROUND

Alcan Brasil manufactured and distributed aluminum pressure cookers (Rochedo Brand) for many years with no significant record of product failures in the field. In May 1983, Alcan Brasil initiated a recall of the Rochedo Brand pressure cookers as a result of findings by Battelle Columbus Laboratories that the cooker could sometimes be opened while still under pressure. Battelle

tested the cookers at Alcan Brasil's request after Alcan Brasil had received two complaints from the field related to the cooker being opened while pressurized.

Immediately following the recall, Alcan Brasil began to receive a significant number of complaints alleging failure of the cooker. Some of these complaints clearly related to the opening-while-pressurized problem, but the majority do not appear to be related to that problem.

You wish to have an independent laboratory investigate these recent claims, and you have asked us to assist you in determining if any or all of the claims appear to be legitimate.

OBJECTIVE AND SCOPE

The objective of our work will be to provide you with an independent, technical assessment of the various claims and to establish by what mechanisms, if any, the alleged failures might have occurred. A further objective will be to bring to your attention serious design/product flaws, if any, which we may identify during our investigations.

To meet these objectives we will examine the claim documents, the allegedly failed cookers, and other background information as supplied by you. We will also design and perform laboratory tests which we determine to be necessary in order to adequately evaluate possible failure scenarios.

We understand that we may look to you to gather and supply the necessary information and materials, including unused samples of the cookers in question.

APPROACH

With this type of "investigative" program, we can not determine in advance the specific steps to be taken. The course of our work will depend significantly on our day-to-day findings. In general, however, we anticipate conducting the following tasks.

We will first examine the claim documents which you have provided. We will attempt to categorize the claims into technically similar groups. For example, one group will be those claims related to the claimant manually opening the pressurized cooker. A second group may consist of those claims where internal pressure reportedly forced the lid off, but there are no signs of any damage to the cooker base or cover.

Once the claims have been categorized, we will postulate potential failure mechanisms which fit with each group. Then, on a group-by-group basis, we will examine the various postulates from a theoretical standpoint to determine which, if any, of these are technically possible or likely based on our professional judgment.

At this stage of the program, it may become necessary to conduct laboratory experiments to obtain the data needed to fully evaluate a possible failure mechanism. For example, we may need to measure the thermal expansion/contraction of the various cooker components, the force required to bend one of the cover locking tabs, the effects of steam and pressure on the rubber gasket, etc. Before conducting such experiments we will review the information available from the manufacturer to determine if the data already exist and are adequate for our purposes.

As our work progresses, we will be alert to any observations or findings which may indicate a serious product defect. Should such a defect become apparent, we will advise you of it immediately. If our early examinations indicate strongly that none of the claims (except those involving the manual opening of pressurized cookers) are valid (i.e., the claims are physically impossible) we will so advise you.

COST AND DURATION

For the work outlined above, we propose that you authorize a budget for professional services not to exceed $6,000 per month (exclusive of expenses) for a period of three months without prior approval. Expenses such as for travel, communications, report production, special waste disposal, and directly related costs will be billed in addition to the professional service charge and shown as a separate figure. Invoices will be submitted to you monthly and are payable upon receipt by Alcan Aluminum Corporation.

We expect to start work immediately after receiving your authorization. We will keep you informed of our findings as our work progresses by telephone and through brief letter-reports. At the conclusion of the three-month period, we will be in a better position to discuss what further work, if any, may be required.

Although we feel the proposed time and cost are adequate to bring the program to a successful conclusion, completion within these limits depends not only on daily developments in the work, but also on changes in the direction of the work as dictated by your needs or desires. We will bring to your attention as soon as recognized any factors that will affect these estimates.

STAFF RESPONSIBILITY

I will be in charge of the program, and understand that you will provide general direction and policy decisions on behalf of your organization. Associated with me will be other staff members with backgrounds particularly appropriate for this study.

GENERAL PROVISIONS

Our work for clients is conducted on a confidential basis, and we will treat information developed for you in accordance with our Established Professional Standards. All written correspondence to you will be marked "CONFIDENTIAL TO COUNSEL."

Neither party will use the name of the other for advertising or promotional purposes without prior permission in writing, nor are our reports to be used in whole or in part outside your organization without our prior written approval. No authorization is needed if our reports are used in whole in any resulting litigation.

Our work will be on a best efforts basis. We trust that the results will meet the objectives sought, and we have assigned to the work professional personnel having the required skills, experience and competence. In any event, our liability for damages direct or consequential resulting from this work will be limited to the amount paid to us hereunder.

Any change in this agreement shall be confirmed in writing. This agreement shall be interpreted according to the laws of the Commonwealth of Massachusetts.

This offer shall remain open for a period of 30 days from the date of this letter, unless extended in writing.

Our agreement may be terminated on 15 days' written notice by either party, or within such lesser time as we may find necessary to conclude the work currently under way and summarize our findings for you.

ACCEPTANCE

We appreciate the opportunity to work with you on this important assignment. To authorize us to proceed, please sign and return the enclosed copy of this proposal.

Very truly yours,

/s/ PAUL B. MONAGHAN
Paul B. Monaghan

/nrm
Letter in duplicate

Approved for
ARTHUR D. LITTLE, INC.

By MARTHA COTTON
Authorized Contracting Officer

Accepted on behalf of
ALCAN ALUMINIO DO BRASIL, S.A.

By _____
Title _____
Date _____

(2)

Supreme Court, U.S.
FILED
JAN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1077

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,
AND
MANUEL DIAZ,
PETITIONERS,

v.

LERCY D. BENITEZ-ALLENDE, ET AL.,
CARMEN CRUZ DIAZ, ET AL.,
RAMONITA GARCIA ANDINO, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to The United States Court of Appeals For the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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I

QUESTIONS PRESENTED

1. Whether the exercise of *in personam* jurisdiction by federal courts was improper when the foreign corporation, through its sales representative, shipped almost a quarter million defective pressure cookers into the forum State.

2. Whether questions of evidence applied under familiar legal rules, and factual findings supported by substantial evidence, warrant review by this Court on certiorari.

II

LIST OF PARTIES

The parties to the proceedings below were the respondents, Lercy D. Benitez-Allende and Nestor Javier Matta, both personally and representing the conjugal partnership by both composed, and Rafaela Allende, Carmen Cruz Diaz, on her own behalf and on behalf of the Conjugal Community had with Elpidio Rivera Martinez and/or Elpidio Rivera Martinez on his behalf, and Ramonita Garcia Andino, Ramonita Andino Rosa.

The petitioners were Alcan Aluminio Do Brasil S.A. and Manuel Diaz.

TABLE OF CONTENTS

	Page
Questions Presented	I
List of Parties	II
Opinion Below	2
Jurisdiction	2
Statement of Facts	2
Reasons Why the Writ Should Be Denied	5
I. Two Courts Gave Full Consideration to the Issues, Which Rest on the Particular Facts of This Case. The Petition, in Essence, Seeks a Third Review on Sufficiency of the Evidence	5
A. Jurisdiction	5
B. Evidence-related Claims	8
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Asahi Metal Industry, Ltd. v. *Superior Court of California, County of Solano*, 107 S. Ct. 1026 (1987)	6
Burger King Corp. v. *Rudzewicz*, 105 S. Ct. 2174 (1985)	7
Celotex Corp. v. *Catnett*, 106 S. Ct. 2542 (1986)	8, 9
International Shoe v. *Washington*, 326 U.S. 310 (1945)	8
Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1974)	7
United States v. *Johnston*, 268 U.S. 220 (1925)	9
Verlenden B.V. v. *Central Bank of Nigeria*, 103 S. Ct. 1962 (1983)	8
Worldwide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980)	6

Statutes:

28 U.S.C. 1332	2
15 U.S.C. 2072	2

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE COURT:

The Respondents Lercy D. Benitez, Carmen Cruz Diaz, and Ramonita Garcia Andino, et al., respectfully pray that this Court deny the Petition To Review the Judgment and Opinion of the United States Court of Appeals for the First Circuit and judgment and jury verdicts of the United States District Court for the District of Puerto Rico.

Opinion Below

The Opinion of the Court of Appeals for the First Circuit rendered on September 20, 1988 (857 F.2d 26), and the judgment of the District Court appear in the Appendix to the Petition.

Jurisdiction

The jurisdiction requisites are adequately set forth in the Petition.

Statement of Facts

Invoking the Federal District Court's jurisdiction pursuant to the diversity statute (28 U.S.C. 1332), and federal question jurisdiction based on alleged violations to the Consumer Products Safety Act (15 U.S.C. 2072(c)), the Respondents-Plaintiffs filed three separate suits which were consolidated for trial purposes. All three won jury verdicts, and after two courts' review, the Petitioners essentially ask this Court to conduct a third canvass of the following facts:

Early in the year 1972, Alcan Aluminio Do Brasil, S.A. ("Alcan"), a Brazilian company, instructed its export advisor, Mr. Erich Schmid, to meet Mr. Manuel Diaz ("Diaz") in San Juan, Puerto Rico to discuss the engagement of Diaz as Alcan's sales representative in Puerto Rico. Diaz, a citizen of the State of Florida and owner of property in Puerto Rico, accepted Alcan's offer and since that date has distributed Alcan's products in the Puerto Rican market among its wholesalers and retailers.

One of the products distributed by Diaz was a pressure cooker manufactured and designed by Alcan under the brand name Rochedo. Between the years 1977 and 1981, Diaz distributed 300,000 Rochedo pressure cookers of which 240,000 were purchased by citizens of Puerto Rico, with the remaining 60,000 being distributed in the states of Florida and New York, communities in which large numbers of Puerto Ricans are found in the continental United States.

Prior to initiating the distribution of its product in the United States, Alcan submitted the pressure cooker to testings by Underwriters Laboratories ("UL") in Illinois, seeking that institution's seal of approval which is generally accepted as the industry's standard. On Alcan's behalf, beginning in 1975 UL conducted various tests of the Rochedo pressure cooker, and due to findings of deficiencies related to maximum operating pressures and cover openings tests, the pressure cooker did not receive the UL approval until 1981 when the deficiencies were corrected. By then Diaz had already distributed in Puerto Rico 240,000 of the non-UL-approved Rochedo pressure cookers.

In the year 1982 Alcan commissioned Battelle Laboratories in the state of Ohio to "evaluate the force required to open the lids on samples of pressure cookers manufactured by Alcan." The tests conducted by Battelle Laboratories on the non-UL-approved pressure cookers concluded that "observations during the experiments indicated that steam and hot water spray present a hazardous condition at internal pressure of 2 PSIG and above. Also the propelled lid may present a hazard at pressures of 4 PSIG and above".

On December 29, 1983 the U.S. Consumer Product Safety Commission ("CPSC") announced through its news release, that in cooperation with Alcan approximately 300,000 pressure cookers were being recalled due to a faulty gasket. Consumers were advised that these cookers would be exchanged for UL-approved cookers if the old ones were returned to a Miami center. Diaz placed an ad in newspapers, published in Puerto Rico, on January 25, 1984 announcing the "voluntary recall".

Prior to the recall, respondents Benitez, Cruz and Garcia suffered injuries as a result of the defects in the Rochedo pressure cookers, and subsequently filed the claims subject of Petition.[1]

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[1] Before the actions were instituted Respondents sought and obtained from the CPSC copies of the public records compiled by the administrative agency on the Rochedo pressure cookers, including the aforementioned laboratories tests which were submitted with the trial record.

Attempting to avoid trial on the merits, Petitioners filed various separate unmerited dispositive motions, ranging from challenging the court's *in personam* jurisdiction, to failure to include "indispensable parties" (unnamed Puerto Rican wholesalers). For nearly two years after initial filing, the court below entertained and ruled on these motions, and subsequently issued the trial's scheduling order.

Through a Rule 37 motion to compel, Respondents apprised the court that Alcan had yet to provide full answers to interrogatories submitted, to produce documents, and most important, produce the results of tests conducted by yet another U.S.-based research institution.[2] The court was persuaded that this information was vital to a proper presentation of the case, and for Respondents' expert's full opinion. Discovery was reopened for Alcan to comply with the Order entered on the Rule 37 motion.

A jury trial was held, and at the end of the presentation of all evidence, Petitioners moved the court for direct verdict (Rule 50), which was denied. On October 29, 1987 the jury decided for plaintiffs, and judgment was entered on October 30, 1987. Petitioners did not move for a new trial. Both parties appealed to the Court of Appeals for the First Circuit which through an unpublished opinion, dated September 20, 1988, denied all of Petitioners' claims, essentially the same reproduced before this Court, and denied Respondents' appeals in part, and remanded. (Petitioners' Appendix A1-A22).[3]

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[2] In 1985 Alcan commissioned Arthur D. Little, Inc. in Cambridge, Massachusetts, to evaluate the alleged failures of its pressure cookers.

[3] The issues raised by Respondents' appeal are not before this Court.

Reasons Why the Writ Should Be Denied

I. Two Courts Gave Full Consideration to the Issues, Which Rest on the Particular Facts of This Case. The Petition, in Essence, Seeks a Third Review on Sufficiency of the Evidence.

Petitioners raise numerous issues as alleged errors committed by the two previous courts. Canvassing through the Petitioners' Brief these issues can be reduced to two fundamental claims, as done by the Court of Appeals, namely jurisdiction and evidence-related claims.

A. *Jurisdiction*

The Petitioners ignore and avoid the detailed findings of facts on the jurisdictional issue as articulated by the appellate court in its opinion and judgment of September 20, 1988 (Pet. Appendix A-5). Consistent with the district court, the findings of the appellate court show that the jurisdictional issues are not as complex as perceived by Alcan. In summary, the foreign manufacturer engaged an American sales representative to develop the Puerto Rican market which it favored overwhelmingly over other States, as shown by the fact that 80% of the imported pressure cookers were sold in Puerto Rico. Through the normal channels of trade the foreign manufacturer conducted continuous and systematic pursuit of business in the forum State. The defects in its product surfaced in Puerto Rico, and as a result economic and physical damages have befallen on citizens of the Commonwealth. Thus, the Federal District Court for Puerto Rico was the proper forum for these citizens to bring suit against the manufacturer who has made itself available to the privilege of marketing its product in the United States and Puerto Rico. Its amenability to suit in the forum State is merely the price it pays for the benefits it reaps:

> "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State', *Hanson* v. *Denckla*, 357 U.S. at 253, 2 L.Ed.2d 1283, 78 S. Ct. 1228, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risk is too great, severing its connection with the State. Hence, if the sale of a product of a manufacturer or distributor such as an Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others."
>
> *Worldwide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980).

Further, Petitioners' reliance on *Asahi Metal Industry, Ltd.* v. *Superior Court of California, County of Solano*, 107 S. Ct. 1026 (1987) does not help the issues raised; on the contrary, it supports the judgments of the courts below:

> "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."
>
> *Asahi*, 107 S. Ct. at 1033.

In the factual setting of this case all of the above elements are present, yet Alcan insists it did not purposefully intend to serve the market since its products are sold worldwide, and it has "no minimum contacts" with the forum State claiming it merely filled orders for sale "FOB–Brazil". Conveniently disregarding the admitted active solicitation of business in Puerto Rico by the sales representative (Diaz), and a clamor of a "new international marketplace", the Petitioners ascribe to the First Circuit "insensitivity" to the rights of foreign nationals for its refusal to accept formalistic business structuring to defeat jurisdiction. The Petition overlooks the fact that it is precisely today's technologies and modern commercial life that determine business transactions without territorial presence. *Burger King Corp.* v. *Rudzewicz*, 105 S. Ct. 2174, 2184 (1985).

Finally, Petitioners perceive a State's interest in protecting its citizens from injuries caused by defective products, through authorization of judicial actions, as equivalent to the imposition of State tax law to a foreign parent corporation.[4] Whether such tax is invalid is not a matter of record in this product liability case; it is not part of the decision below nor is it a question presented by the Petition. The First Circuit Court of Appeals, upon Petitioners' argument that *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1974) was a case on points against the exercise of jurisdiction, merely held that this case does not involve "instrumentalities of commerce" but tort law, "a subject matter that historically belongs to the states."

The Petition does not challenge this historical fact; instead, seeking to be cloaked with a type of immunity not enjoyed by the foreign government or nation under whose laws it has been organized, the privately-owned corporation disregards the

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[4] Alcan had previously argued that pressure cookers, common consumer objects, were "instrumentalities of commerce" regulated by Congress. *Pet. Appendix A-9.*

legal fact that even commercial activities carried on by the foreign sovereign in the United States can make the sovereign liable in state or federal courts. *Verlenden B.V.* v. *Central Bank of Nigeria*, 103 S. Ct. 1962, 1968-69 (1983).

It is well-settled doctrine that *in personam* jurisdiction over a nonresident is proper only when that party has certain minimum contacts with the forum so that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe* v. *Washington*, 326 U.S. 310, 316 (1945). While Petitioners concede that Puerto Rico's "long arm" jurisdictional statute stretches up to the points allowed by the Constitution, the facts show that the foreign manufacturer's connection with the forum State was such that it could reasonably anticipate being haled into court there. *Worldwide Volkswagen*, supra, at 295. Thus, there are no constitutional issues presented in the jurisdictional claims.

B. *Evidence-related Claims*

Claiming alleged departure by the two courts below from the principles established in *Celotex Corp.* v. *Catnett*, 106 S. Ct. 2542 (1986), Petitioners, in essence, ask for a third review of the trial record.

To sustain the allegations the Petition starts with an obvious misstatement of the record. At page 6 of the Brief, Petitioners recite as an alleged part of the trial transcript a colloquy between Alcan's attorney and Respondents' expert. The fact is that the excerpts are part of a deposition taken on July 2, 1987, *nearly three months before trial*. Omitted from the Brief is the following exchange that took place between the deponent and the attorney:

> "Q. Dr. Soderstrom, have you looked at the data supplied to the plaintiff's attorneys from Alcan that specifies the point at which that pot will explode?"

> "A. What I have from the attorneys and from Alcan in that respect is that I have a lot of literature from them that is all in Portuguese. I believe it is with reference to this pot. I also have some literature from a UL-approved pot *which is not this pot.* I don't have the information concerning that for this particular pot".

Deposition of Dr. Soderstrom at page 15.

This evident withholding of information, along with performance tests on the pressure cookers which were not provided to the Respondents, led to a "Motion To Compel" which was granted by the district court on September 29, 1987 when in clear terms it ordered the Petitioners to comply with discovery obligations.[5] The alleged "departure" did not occur as the *Celotex* opinion does not stand for the proposition that the parties may withhold relevant information, and circumvent discovery rules, in order to avoid trial on the merits.

Finally, the Petition asks this Court to review the effect of a party waiving his right to object to jury instructions and to review jury verdicts—matters which are not recognized grounds for the grant of certiorari.

The present case rests entirely on the facts and appraisal of inferences drawn from the evidence presented at trial, already resolved twice in favor of Respondents. Petitioners ask this Court for a third review of the evidence and the facts, contrary to the rules long established by the court on such matter: "We do not grant a certiorari to review evidence and discuss specific facts". *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Furthermore, the case is of significance only to the parties involved, irrespective of conjectures.

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[5] Notwithstanding the limitations imposed by the manufacturer's recalcitrance to discovery, at the deposition the expert provided opinions which were fully developed at trial upon production and examination of pertinent data. (Pet. Appendix A-11).

Conclusion

For all the above reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

FEDERICO LORA LOPEZ
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Hato Rey, Puerto Rico 00919
(809) 758-4995
Counsel for Respondents